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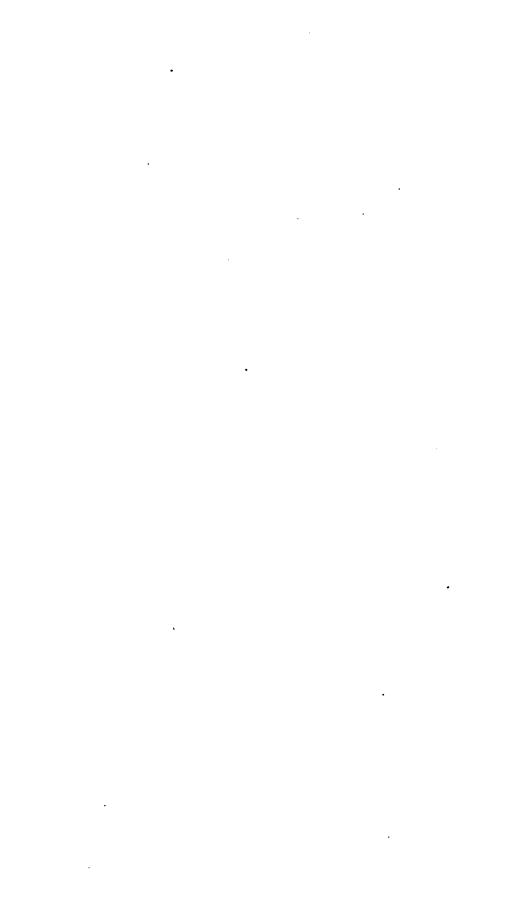
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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Courts of Exchequer

Exchequer Chamber.

WITH TABLES OF THE NAMES OF THE CASES AND THE PRINCIPAL MATTERS.

By ROBERT PHILIP TYRWHITT, Esq. BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

"Ejus (Analogia) hace vis est, ut id quod dubium est ad aliquid simile de quo non quaritur, referat; ut incerta certis probet." Quinct. Inst. Orat. lib. i. c. 6.

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TABLE OF THE

NAMES OF CASES REPORTED

IN THIS VOLUME

Page	Page
a_	Α.
Baddeley ats. Primrose 370	ABBOTT ats. Watson . 64
and Another ats.	Alivon and Another, Provisi-
Mellor . 962	onal Syndics of the Effects
Baker v. Wills 279	of Beuvain a Bankrupt, v.
Barker v. Weedon 860	Furnival
Bate v . Kinsey . 662	v. Furnival 370
Bates and Others ats. Ellis,	Andrew ats. Constable and
Assignee of the Sheriff of	Another 206
York 58	Anglesea (Marq.) ats. Dibben 926
v. Pilling . 231	v. Dibben ih.
Bazley v. Thompson 955	· ····· v. ···· v. Peyton,
Begrez ats. Fisher 65	Dibben, and Lill ib.
Bell ats. Sanderson . 244	Arden v. Mornington . 56
Bennett uts. Northwaite, Ex-	Argles ats. Best, Assignee of
ecutor &c. 236	Thorowgood 956
Bentley v. Hook 229	Ashby v. Goodyer 414
Beresford ats. Johnson . 57	Ashman v. Bowdler . 84
Bernasconi ats. Chambers 531	Ashurst, Gent. one, &c. ats.
Best t. Gompertz 280	Simpkin 780
, Assignee of Thorowgood,	slett ats. Philpott . 729
an Insolvent, v. Argles 256	Attorney-General, Appellant,
Biggs ats. Mestayer 466	and Hope and Others, Re-
Billing v. Macher 810	spondents 878
Bird ats. Reeve 612	r. Duffy 284
Blackburn v. Peat . 38	v. Staff and
	Another 14

TABLE OF THE

NAMES OF CASES REPORTED

IN THIS VOLUME.

Page	Page	
A.	В.	
ABBOTT ats. Watson . 64	Baddeley ats. Primrose 370	
Alivon and Another, Provisi-	and Another ats.	
onal Syndics of the Effects	Mellor 962	
of Beuvain a Bankrupt, v.	Baker v. Wills 279	
Furnival 751	Barker v. Weedon 860	
v. Furnival 370	Bate v. Kinsey 662	
Andrew ats. Constable and Bates and Others ats. Ellis		
Another 206 Assignee of the Sheriff of		
Anglesea (Marq.) ats. Dibben 926	York 58	
r. Dibben ib.	v. Pilling 231	
v. Peyton,	Bazley v. Thompson 955	
Dibben, and Lill ib.	Begrez ats. Fisher 65	
Arden v. Mornington 56	Bell ats. Sanderson 244	
Argles ats. Best, Assignee of Bennett ats. Northwaite, E.		
Thorowgood 256	ecutor &c	
Asbby r. Goodyer 414	Bentley v. Hook 229	
Ashman v. Bowdler 84	Beresford ats. Johnson 57	
Ashurst, Gent. one, &c. ats. Bernasconi ats. Chambers .		
Simpkin 780	Best r. Gompertz 280	
Aslett ats. Philpott 729 -, Assignee of Thorowgoo		
Attorney-General, Appellant,	an Insolvent, v. Argles . 256	
and Hope and Others, Re-	Biggs ats. Mestayer 466	
spondents 878	Billing v. Macher 810	
v. Duffy 284	Bird ats. Reeve 612	
v. Staff and	Blackburn v. Peat 38	
Another 14	Bonham ats Monck 312	

Page ,	Page	
Bourne ats. Walker & Ors. 121	Cawdor (Earl) ats. Doe d.	
Bower ats. Rouncill 374	Lewis 852	
Bowdler ats. Ashman 84	Chambers ats. Nicholls and	
Bowman ats. Gardner 412	Another	
Boyle ats. Herring 801	Champneys ats. Farmer . 859	
Braithwaite, Executor of Ul-	Chambers v. Bernasconi . 531	
lock, v. Lord Montford 276	Chappel v. Hicks 43	
Brain, Assignee, v. Hunt and	Charlesworth v. Rudgard . 824	
Another 243	Chilton v. Ellis , . 369	
Braddick ats. Elston and Ors.	Clarance v. Marshall, Clerk 147	
Assignees 123	Clarke and Wife v. Webb and	
Bradshaw, Administrator, ats.	Another 673	
Serle, Executor 69	Cochran v. Fisher 424	
Britten and Others ats. Brit-	Cocker ats. Finch 285	
ten, Administrator 473	Colburn ats. Patmore 838	
Bright v., Walker 502	v. Patmore 677	
Britten, Administrator, v. Brit-	Coleman ats. Reid 274	
ten and Others 473	Cooper ats. Porter 456	
Buchanan ats. Russell 384	Constable and Another v. An-	
Bulteel ats. Kensit 59	drew	
Burford ats. Wooden 264	Cotton ats. Woodward 689	
Burgess ats. Spicer 598	Crease ats. Dadd 74	
Burnett ats. Owen 133	Crowfoot & Others, Assignees	
Burn v. Morris 485	of Streather a Bpt. v. Lon-	
Burleigh v. Kingdom 369	don Dock Company 967	
Burrell ats. Pepperell 809	Cubley ats. Walter 87	
Butcher ats. Sowerby & Ors. 320	Currey and Others ats. Byne	
Byne and Another v. Currey	and Another 478	
and Others 478	Cullum v. Leeson 266	
10 · 4	esting and Washington	
€.	D. Dadd v. Crease	
Calvert (in Smith v. Calvert)	Dadd v. Crease 74	
ats. Rex 77	Darling v. Gurney 2	
Carlisle, Assignee, ats. Gar-	Day ats. Emery, surviving part-	
land	ner of Rich 695	

4 A A A A A A A A A A A A A A A A A A A	VOLUME. VII
Page	Page
Deane des. Perrottand nobes	Edwards' ats: Thomas "." 833
Delcroix, Executrix, ats. Wat-	ats. Wigley
son storiors s'w storiors 206	Eicke ats. Lewis
Delcroix, Executrix, ats. Wat-	Eicke ats. Lewis
Dibben J. Marq. of Anglesen 926	Ellis ats. Chilton
Dibben J. Maiq. of Anglesea 926 Dick ats. Lardier 1. 200111 289	, Assignee of the Sheriff of
Dickinson r. Reviolds 374	York, v. Bates and Others 58
Teague "0" 450	Ellison V. Roberts
Dignam ats. Edwards . 213	Elridge ats. Gregory, q. t. 235
Disable National Consultations	Elston and Others, Assignees, H
Dixon V. Norrall' 1 101: 031013	v. Braddick 123
Dods ats. James 101	Emerson ats. Ryalls
Dixon v. Nurtali 7 July 1013 Dods ats. James	Emery, surviving Partner of Rich, v. Day
Gillet v. Roe	Rich, v. Day
Gillet b. Roe	Ensell ats. Phillips 812
Lewis v. Earl Cawdor 852	Evans, our tam, v. Moselev.
- Maslin v. Parker ". 144	Sheriff of Shropshire. 169
Harries and others v.	At \$5 + 4min, and
Morse Touton I have 185 v. Hare 29 Downes ats. Edinunds 173	Sheriff of Shropshire.
r. Hare	Farman Champana 980
Downes ats. Edmunds 173	Farmer v. Champneys 809 Fidgett v. Penny 600
Drake v. Lewin 730 Duffy ats. Actorney-General 284	Figgins v. Ward & two Ors. 282
Duffy ats. Attorney-General 284	Finch v. Cocker
Duckett v. Williams 240 Duncan v. Grant 818	Fisher v. Begrez
Duncan v. Grant	risher v. Degrez
Falls (C. St. 1910)	v. Papaniculas 44
viscos and Others als Bane	
T Endon/ fin	Flynn ats. Doe d. Ellerbrock 619 Foster ats. Haynes 65
	ats. Marshall 93 n. (a)
Earnshaw ats. Wasney, Ex-	Freeman ats. Tabram, Gent.
ecutor 804	•
Easton v. Pratchett	one &c
r Digram	Provisional Syndian of the
Sel and specific and be	Provisional Syndics of the, Effects of Beuvain, a Bpt. 751
Edwards ats. Edwards 438	Furnival ats. Alivon 370
	A GLINTAL GOO, ZARTON

Page	Page Page
G .	100nes & Others Walkingh
Lakin and Others, Executors 214: namwod ranbrag. of Watson, T. Massie 221 sangista A. slaira bhalag.	Hewele and Ors. Mar I homas 385
Gerland v. Carling T. Natson, 22	8004 ssignees . notleM. v. tiweH
Garratt Expander v. Dick	Officer it is being the committee of the
Garratt, Ex parte. Court Exparte. Court Exparte. Court Structure of the Court of th	Hickethers Chapped do H . 3 43
Leeson //k. Cullin	Hill ats. Gillett saxiquas 1290
Lemon als Nicholson	882 v. Salt
Leonard v. Wilson	delinson :. Beiffderets abniff?
Gillett v. Hill Grompertz ats. Best Groodyer ats. Ashby Groton and Others ats. Miles, 9 Shard Labb niw 295	Hधेडिकी वरशी Whigres 328
Lewis . Morris & Roberts 907	CSC nees of Coaysines Edwidoch
Govin dis. Dioris of Roberts 907 (1888) 7 Govern de Roberts 907 (1888) 7 Grant ats. Duncan 1818	Hooker v. Nye . Hoinal 776
Grant ats. Duncan 818	Hope and Others, Respon-
Greenslade v. Tapscott 566	dents, atsbruttoiney Genel
Gregory, qui tam, v. Elridge 235	Appellant 878
Gregory, qui tam, v. Elridge 235 Gregory, qui tam, v. Elridge 235 Griffith ats. Hatsall Griffith ats. Hatsall Grosvenor ats. Summers 1981 1981 1981 1989 1989 1982 1983 1984 1987 1989 1980	Howell and Apor. Assignees,
Tiosvenor ats. Summers . 222	Mar Jones 4 548
Gurney ats. Barling remarks 1	Jones 548 Series Jones 1548 Hughes and Anor. ats. White-
Gurney ats. Darling	head suing with Dorning &
Gurney ats. Darling reinviol 2 Guy v. Newsom	head, suing with Dorning & others, Assignees
	Humphrey and Another Ats
н.	Humphrey and Another ats.
Hamber v. Purser 41 Hammond v. Thorpe 4	labitants of City of London 10
Hammond v. Thorpe 1991: 1838	ling 606
Harding beath bell one raise 1814	Hunt and Another ats Bring
Hare ats. Doenthis visitis 1/290	Assignee
Hare ats. Doe Harper ats. Megginson 194	A insev its. Rate on volund
"Harris v. Osbourh " !!!!! 21. 445"	Kirby Ellier Name
Harter and Ahother, Assignees,	Kirwan, Administratrix 🥖
121 Assignees of Cochrane allph 78	Kirwan ahd Others 4
Hatsail's Ghadh Just 181487	Just 652
EST Marsie uts Helloging Selection	Jacobs willenderegulard Amer. 272
1 CHeane des Tipmes Out 1772	Hackson a Staubbrd salmon 3330
Hellings W. Stevens " 115 WX BIV 270	101 Assignment of the Markett I
Henman 'att.' Wilb ♥ 0 * 11 (\$30.1957)	Jesse Addininkt nature st I Roy
Herbert and Abother; Excell 0	Ol and another; Executors . 626
tors, v. Pigot, Bart 285	Iggulden v. Terson 309

'ngaq Page ;	Page
Danes & Others Hysel Walker, 345	L.
Tanto Levell and Apother	Lakin and Others, Executors
Bewitter Melton ssengiss \$48:	of Watson, v. Massie 39
110 v. Roberts, Executring 110	Lardner a Dick
: v. Robesterand Another ill	Lasbury ats. Gould Hill Halif
84ill use Gillett eszirtus 48	Leeson ats. Cullum
v. Key	Lemon ats. Nicholson 308
connson v. Berensprd, point 157	Leonard v. Wilson 415
3 ≤6 svd₁Anwi nes, AssigoH	Lewin ats. Drake750
Conees of Coolympes Bkpty of I	Lewis v. Morris & Roberts 907
871uoker n. Nye ttoirraM 776	ats. Siggers 847
Offope and Ocher Respon-	157
638 dents, . atabradainessa tessas	v. Rogers 872
Appellant 878	London Dock Company ats.
Howell and Apor. Assignees,	Crowfoot & Others, Assig-
Keatley ats. Shepherd and Ors.	nees of Streather a Bkpt. 967
	Lorymer v. Stephens
Kensit v. Bulteel	Lucock ats Redit
Key ats, Jones 238	Lynch ats. Knowles 477
King v. The Mayor and In-	11
habitants of City of London 709	M
v. Monkhouse	Maberly ats. Rex
King's Warrant 3821	Macfarlane ats. Preedy 1110111 193
Kingdom att. Durieign 303	Macher v. Billing
Kinsey ats. Bate	Mackenzie ats. Neale 670
	Marshall v. Foster, $93 n_1(a)$
Kirwan, Administratrix, v.	Marriottats. Johnson & Anor 1
Kirwan and Others 491	1
and Others ats. Kin ::	
72 . read, lAdministration of cons1491;	
Gi Knowles bullynch (10 eA) 81477	Maywell ate Strickland 346
Ol ——, Assignet of Wilson of	
1016. and another State cutons 6:2	di traces moonidat Admitte (implicio)
5. Jegulden: Terson 3.	
me er enabnigge ei	ma High Bart 28

Page;	Page Page
Melton des Hewitt bas werd 1003	Nuttallats: Divottl Ins 4904043
Memoranda - 900 \ 31\386; 1024	Nye ats. Hooker 119. Aw 32776
Mestayer v. Biggs A 466	Pape wix, Read 450
Miles, Assignice, vo Gorton &	Protein of Company 456
etaOtherstelle: // Galletsrad1O649	Professett a/s Endown 1521
Monck v. Bonham! War 200312	Oldham v. Allen J.W. , vb. 318
Montford (Lord) att Braith	Osbourn ats. Harris, but 445
178waite, Executor of Ullock 276	Owen v. Burnett
Monkhouse ats: King i 😗 🐠 284	Priestley v. Watson
Offe, and anathrithe consists M.	Primrose to Buddeley 570
Morland ation What leyer 💎 255	Packer ats. Doe d. Masling 144
186 mington datal Ardenbrooks	Packer ats. Doe d. Mastin
Morris ats. Burnilly act 1/2485	Papanicolas ats. Fisher 44
Morse ats. Doe du Harries &	Parkinson ats. Morris 700
186 tills p. Finierson aradiO361	Patchett ats. Perry
Moseley, Sheriff of Shropshire,	Patmore ats. Colburn 677
ats. Evans, qui tam 169	v. Colburn
, Sheriff of Shropshire,	Paull ats. Paull
17 cats. Summers	Peat ats. Blackburn . 111928
, Sheriff of Shropshire,	Pell ats. Stephens Chal-
grats. Summers of the sum of 158	Penny ata Fidenth Clerk
Mudry of Nawman & Anor, 1098	Penny ats. Fidgett 650
Administrator 69	Penton ats. Simpson
Sessions and Robes 275	Perperell Page Burrell 1 809
Shoulf of Middersex (in Wol-	Perrott Puppeana
Nation P. Tozer Nov. Rev. 601	Phillips v. Ensellightel 812
Nation p. Tozef June 16 16 16 16 16 16 16 16 16 16 16 16 16	Jacobs, Jacobs, Jacobs, 652
Newsom ats Guy 31	Philpott v. Aslett
Newman & Apor ats Mudry 1023	Pickup and Another, Execu-
Newman & Anor. ats. Mudry 1023 Nicholson v. Lemon 308	tors, v. Wharten 310 1101, 224
Nicholson v. Lemon	Pigot, Bart ats, Herbert and
Noott and Another ats. Wills	Another, Executors 285
Noott and Another ats. Wills, Texecutrix	Pilling ats. Bates L. Dun 2000 281
Northwaite, Executor &c. v.	Pitt v. Pocock & Biggs, Gents.
Northwaite, Executor &c. v. Bennett	one &c

Page	Page Page	
Percel and Biggs, Gents sile	Roberts and Another, Execute 14	
&c. ats. Pitt Bagell durn 85	garixes, ats. Jones de maonto 148	
Pope ats. Read 403	ats. Ellisch	
Porter v. Cooper 456	Roe ats. Doe d. Floyd A. solil65	
Pratchett ats. Easton 472	ats. Doe d. Gillett Link 649	
Preedy v. Macfarlane 93	Rogers ats. Lewis 10th 100812	
Price and Another ats. Rex 60	Rohrs v. Sessionso i Luitudels	
w. Huxley and Con 15 68	Rouncill v. Bownnowd stier674	
Priestley v. Watson 916	Rowe v. Rhodes a perculandité	
Primrose v. Baddeley 370	Roy and another, Executors,	
Promotions. See Memoranda,	ats. Jesse, Administrator 1826	
	Rudgard ats. Charleswerth 824	
goals, I was so computed as	Rush v. Smyth wi Nasiu 675	
·	Russell v. Buchanan 1884	
Ralfe ats. Simpson 325	Ryalls v. Emerson . 2 . 0 4 864	
Ravenscroft v. Wise and three	e de la companie de l	
Others	San	
Read v. Pope 403	· • • · · · · · · · · · · · · · · · · ·	
Redit v. Lucock	Salt ats. Hill	
Reeve v. Bird 612	Sanderson v. Bell	
Regulæ Generales 1	Scott ats. Slatter C. 1871. 1872	
	Serle, Executor, v. Bradshaw,	
Reid v. Coleman	Administrator 69	
v. Lord Tenterden 111	Sessions ats. Rohrs 275	
Rex v. Calvert in Smith v.	Sheriff of Middlesex (in Wol-	
v. Calvert	laston v. Wright) ats. Rex 60	
v. Maberly 345	Shepherd and Others, Assig-	
v. Sheriff of Middlesex	nees, v. Keatley Sibley v. Tomlins 90	
in Wollaston 9: Wright 60	Siggers v. Lewis	
Reynolds ats. Dickenson 374	Simplin a Ashuret Gont	
Richard V. Isaac	Simpkin v. Ashurst, Gent.	
Rhodes ats. Rowe	Simpson v. Penton 315	
Roberts and Arrot dis. Lewis 907	n Ralfa 2011 2017	
- 2109; Executrix, ats. Jones 310	Slatter v. Scott 325	
, Daceutia, ato. voices of the	1 Same	

•ys'i Page	Page Page		
Wilkinson, in. returisminaralma	Meth a short sake that , kide to a		
Elic. and Others atdo Saist 1352			
272 v. Smith and Others ellige			
Executor, den Mention Management			
Bhelling v. Ld. Huntingfield 606			
Bolliams ofs. Duesbiff v. v. Pies	Thomas v. Edwards zrotpoex \$35		
Bosby atsetwilight .2\n494			
Werby and Ovelid Butcher 320			
Spicer v. Barghald a programa			
Byring ats. Tedyedd a gologge			
West and Another arthrape '''	Toogodd to Chylinges dgull 582		
Woollaston w. Wrightened Ren	Tower ats. Strumell val 2002		
67. Sheriff of Milders and Serial Control of the Co	Tozer ats. Nathment A vd bot		
Stephens, Clerky id Pelb thgir 16	Trappes v. Harrer and Arer iv		
e88	Wise and three OtherngiesA		
Stevens and the Mings throat 270	Toffs ats. Gregory floriscieve \$20		
184 ats. Knowles, Assignee	Turner v. Denima W. " snis 313		
of Sheriffs of London .1016			
Stokes v. White 786			
Stopherd ats. Jackson 330	\mathbf{w} .		
Strickland v. Maxwell 346			
Strutt v. Smith	Walker ats. Bright 502		
Stunnel v. Tower 862	v. Jones and Others 915		
Summers v. Grosvenor 222	and Others v. Bourne 121		
v. Moseley, Sheriff	Walter v. Cubley 87		
of Shropshire 169	Ward and two Others ats. Fig-		
v. Moseley, Sheriff	gins 282		
of Shropshire 158	Warren ats. Warren 850		
	—— v. Warren 850		
· m	Wasney, Executor, v. Earn-		
Т.	shaw 804		
Tabram, Gent. one &c. v.	Watson ats. Priestley 916		
Freeman 180	v. Abbott 64		
Tapscott ats. Greenslade . 566	v. Delcroix, Execu-		
Teague ats. Dickenson 450	trix		

ľ	• Page
I	Wilkinson, in reputational distributions
ı	£12. and Others at Joseph 352
ı	Wills attal Baker dime ? 279
Ì	Smyle Month of Executor, 18:100 A CTO
Ì	Bhelling vLd. Huntingfitte 606
I	Williams ats. Duckstall
ı	184-ats. Williamson yele 168
	88werby and WilliW Butcher 320
1	Spacer v. BanghaH .v svorgaty
	off ring ate. Progredd's ashoogte
	Woodward to Cotton A bus : 11690
	Woollaston v. Wright and Ren
	70g. Sheriff of Middlesexes 1967
	Mphens, Chaldi,WPM thgirW
	ees ats Moollaston; see Rex.
	Revensessiffiching River 370
.	434 Knude ZAsignec
	of Sheriffs of London 1016
	Stokesov. White . 786
	Stopherd ats. Jackson , 330
į	Strickland v. Maxwell 346
	Strutt > Smith . 1019
	Stunnel v. Tower . 862
	Summers v. Grosvenor 2222
	n. Moseley, Sheriff
	of Shropshire 169
	v. Moseley, Sheriff
	of Shropshire 158
	r.
	Tabram, Gent. one &c. 1.
	Freeman 180
	Tapscott ats. Greenslade 566
	Teague ats. Dickenson 450
	•

Page Page
Terratell, single-decorate deply
Teson ats. Iggulden sliW bases
PR Mayor ared in Haista meden W
O'City of Londonvich Mingelition
Mearton asno Rickets & Augroul T
Thomas v. Edwards syotypax355
Whatlen the Mesley H
White ats. States ats nosque of
Whitehead (suing such DengiT
Ofing and Othersi Assignment or
280, Hughesand Anotherogo 92
Myley p. Edwarders .250 rows
Teler als. Nathemen .v vdiff
Theppes v. Harceshath rogliW
Wise and three Others A
11 ats. Gregory floraciova 20
1shner v. Deddaid W. snikky

W.

だらで	. 307	ats. Drig	YY alker
ers 915	and Oth	v. Jones	
rne 121	rs r Bou	and Othe	
78		v. Cubley	Walter
Fig-	hers ats.	id two Ot	₩ बात बा
. 282	•	•	gins
850	ren	ats. War	Warren
. 850	ns	$v.~\mathrm{Warre}$	
arn-	or, e. E	, Execute	Wasney
S04		•	shaw
. 916	stley .	ats. Pries	Watson
. 64	1	v. Abbot	
ecu-	oix, Ex	v. Delcr	
266			trix

AAMES OF CASES

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Agn Agn	gebreit gericht. Hitelier bereicht	A	7 30₩ - 1000 1
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NAMES OF CASES

CITED IN THIS VOLUME.

A .	Badley v. Loveday page 73
Аввотт v. Rice риде 956	Baillie v. Cazalet 738
Abby v. Lill 851	Baker v. Holtzapffel 565
Abernethy v. Laudale 637	v. Sydee 181
Adamson v. Patmore 683	Baldwin's case 352
Adney v. Vernon 405	Bardons v. Selby 51.777
Aireton r. Davis 273	Barker v. Lea 400
Aked v. Stocks 966 n.	v. Bishop of London 279
Alexander v. Gibson 265	v. Braham
Allanson v. Butler 913 n.	v. Dixon 949
Allen v. Cameron 43	v. Richardson 505
r. Impett 476	v. Weedon 839
Allison v. Hayton 328	Barlow v. Salter 400
Alber r. George 289	v. Rhedes 504 n.
Alston v. Undershill 3. 278. 455. 849	v. Ray 544
Amey v. Long 163	Barnard v. Higdon 224
Amor v. Blowfield 232	Baron v. Husband 154
Anderson v. Hayman 317	Barrett v. Deere 250
Andrews v. Palgrave 738 n.	Bate v. Cartwright 249
Appleby r. Dods 631	Hates v. Pilling 805, 915 n.
Archer v. Bank of England 420	Batson v. Donovan 136
v. Willingrice 820	Bayley v. Lloyd 289
Arden r. Tucker 86	Beales v. Thompson 631
Arris r. Stukely 145	Beardmore v. Rattenbury 454
Arrowsmith v. Masurier 809	Beaumont v. Mountain 691
v. Le Masurier 233	Becquet v. Macarthy 768
Arton v. Booth 289	Beer v. Ward 80
Attorney-General r. Beatson 888	Beeston v. Collyer 610
	v. White 659 m.
	Beik v. Broadbent 405
	Bell and Another, assignees of the
Forbes, and Others 888	Sheriff of Middlesex, v. Foster and
v. Riddell 684	Others 236
Atkinson v. Fell 332	Bell v. Bilton 126
—— v. Jameson 913 н.	v. Thutcher 91
Atwood v. Partridge 657 n.	v. Wardell 779
Austin v. Craven 291	Bennett v. Coker 227
Avelyn v. Ward 393	v. Francis 738
Avery v. Hoole 472	Bensley v. Bignold 947 n.
-	Benson v. King 278
В.	Bentham's case 472 f.
Becon v. Dubarry 341	Bentley r. Donelly 405

WILL THE PARTY OF	B16796581117
Beninger Chambers sie finge die !!	Bhofulteadur, Middletaines I page: 1888
Diffe a Adamson Thomas Alex Otto	Brown v. Burtinshaw . 52:619:at !
Betty v. Adamson 5179qui 2821 805	
Bevan v. Waters idatt// 250	
- Water moin is 665	
Bildell v. Dowse 341	Beldenell v. Brogghtown E 11300
Bidgood v. Way	Bush v. Rawlinson
Divising v. Morrison	Buckler's case and Sto)
Birtev. Appleton direcult . 1 11960	Buckley v. Pirk Gandi . 147
Bire Moreau bannau (1 637 mg)	Bulliv. Sitifis 2.5 1 com)
Birketter, Willan and Others .: 11025	-b- v. Wheeler nm. V. 117 -
Bitto v. Howard doulf. Laton P84	-450 v. Steward >56 att - 406
-001 v. Rowe ide a 825 mat	Bolter v. Horne
-856 v. Crawshaloll brod s ili 980	Bantley v. Poyntz Dradu 298. 726
Bhokburn v. Black man (1. 1) 1690 mg	
	Burdith v. Willett mas H .: 476-
Bhan N. Scholesend Another 746	Buffeigh v. Scott senious L. 1558 Course L. Jenkins Senious L. Jenkins Senious L. 1558 Course L. Jenkins Senious L. 1558 .
Bha v. Nicholson (1971): erese(
	Banney v. Mawson 1100 V. 3 ad 636
Blandfird u. Foote some A . : 660: mul	
	Coars 68 1. Beaumount slohid v lish 88
Blitch v. Archer Justin will , 164	Buffer t. Monte lierell should it 194840
	Bushiv. Steinman . unberell 678 n.
-368 v. Sanders 194411 .4300	Bush v. Davis / LU #91
Bollenham v. Bennettiswidgeid 441-	Better v. Brown nwalte
Bellington v. Harrist . : rooth) 1340	Cath : Gira project :
Battant v. Granffield nebell 765 m.	Catelou 1. Litheby. 19912. wolling
Bottier v. Bonner	Cossey to Diggons . 941
Bottman v. Nasholl .: Apisato 657 m	Couerill 1. Doon . 2 225
Both and Others Executors v. Helt	Cotton v. Duarand 249
Borniton v. Greened . snorman 1358	Calvert v. Archbishop of Cantesburgo
Bulliston's case in in in S98	1 and 1 sand
Bostinquet v. Williams 10010 119	Cameron v. Lightfoot nochuun' 1 . 1990
Benworth v. Limbnick .a dule O .106	ection v. Reynolds double 1 9273
Bosting v. Martin daiss 1618 m.	Campbell n. French Carev.b. Edwards. Carev.b. Squards. Carev.b. Sq
Bottis W - verme // a tension / 1783	Cart de Edwards gang 199-
Bottobile you alled hurst and Attother -	Casto v. Osgood istaid a 91 -
678 Jackson 400 April 1873	Campenter v. Marnell Shubh (2591)
Bothton v. Canhadaire . s vor il. 118	Coan i. Byron larnam. v 446 +
400 v. Canon yolinigin A . 117	COQLE. Proce White. 9-101 1.
Bolds v. Hammond 1900 and 689	Cappenter v. Thorntonvisha 1/458/654)
Bourgero. Hosking and a regulation 98-	Care v. Roberts
Bogddilli. Drammondile bas 1609 m	Carealho v. Burn .voun. O. 2000 May C.
Brandbridge v. Johnson 706	Cabbe. Youngold bus willing a wilder
Britingirdle v. Heald. son rolf .609	Castilion v. Executor of Smith : 1190)
Brathy v. Ricardo . Hayen's 168	Caumack v. Gregory oper L. s mostre
Braithwaitein Loid Montford 455	Chalk v. Peter guari stan 947mi
Brooky v. Wade it . mida 1619 n.	Champneys v. Peck homen as a gosse)
Brent v. Douglas guannal n'c . 489	Charles v. Marsden wall in soul 479 (hu)
Breme. Beales 2011 691	Charteris n. Young Hann's admit
Breiter v. Sparrowinti hs pori 486	Chase stell esting chastie seed)
Bribbino v. Thorp	Cheveley v. Morris 369
Bridgisha v. Lightfoot	~
Bright v. Cowper	Child v. Affleck and Others 596
Brites v. Stephens	Charles v. Clinter of 20198 (
Brittel, Dean and Chapter of,	Chomley's case divid 625 will
Bouyse about 117	Charch v. Brown
	Charchill v. Crease 1930 d. 0 1940 (
Brecke v. Pickwick	City of London v. Dias around a 1849.
- 105 and Another v. Coleman 267	Clark.v. Adams 19111442 4238
- in cog. t. v. Middleton w. / 821 i	+ i.v. Cock south 479 hp(1
	Date v. Fisher emis attal
- ees Morris v. Underdown 393	Clay of Barrett nored to 784
- v. Cook 396	Davis v. Reyner . 809
d	*oL. IV.

	- domestic.
Charaga, Lewiseelbild paperally	Heatingoq Chambers oleffe etwall
Cheen t. Burtinshaw sees indl.	: ← GANK 17/2030 CODE TLE A design A 18877 (
Cobb v. Selby . noegboll .3 - 104-	Day v. Renton
	Deby v. Renton 914
Custon Nach 1 Control	Dayon Serie 32 4641
Hose r Rawlinson.	Deation v. Bins v. V. in 1928 to Deation v. Bins up in 1928 to
College v. Brian oran a 'nel 336 ij College v. Hulme ini il vel 186 il	Distance Descrill
Collins v. Price 2112.1. Child	Dunces Diamond 11 27 US04mis
- 11 v. Martin 19194/ 348-	Destro e Biolondo de 11 Militaria
- tut v. Forbes has and a 929-	Design v. siminform :: 114 1065441 Design v. Minchwich 124 16601 Deraymes v. Noble. 123 1496 Devarill v. Lord Bolton 213 1496 Destrict v. Peamon 12 114 110416811 Dickernon su Walpp 458
Cook mcAllen orreall ma4447	Deraynes v. Noble. / 51 .s -496
liabsev t France. branosiss Fee-	Demrill v. Lord Bolton 578
- 674 v. Hearn 1956 Il. : 666 m.	Dewbust v. Peamon and H. a mid 168/1
- 86. €. Jennings	Diskinson w Walpy 453
Conte v. Jennings anishal il-669/4	Dickins v. Jarvis
Combe v. Woulf . go: #ald . v. 25648	Dickinson v. Hatfield: 99413394
Comber v. Hardenstle remis 4 : 2015	Dimetiale v. Eames 689 m. 1
Comple v. Beaumontecioria & .: 119988	Dison v. Cass
Conner w. Mionke Langitud. a cwarmy	- + v. Broomheld
-: Steinman . : : : : : : : : : : : : : : : : : :	Dec. Barclay
Common College	Breach 885
Comma Claus	Calcust a Francis : 1980
Continue Listable 10011 - 5014 at 3	v. Brightwen
Comes n. Diggons 9.11	Line Dring 919 920
Cutterill v. Dixon 225	d. Fenwick v. Reed
Cotton v. Thurland 249	-teld. Fromd
- 150 v. King actual 60th m.	. Fry v. Fry and Barker 85
Coulednoud dute quantidate : : 1948.	
Cestie v. Halsail 88	+ 8+ p. Giffard 20 10 227 11
Cool. Thomason scottdgia. sec. 340	• • • • • • • • • • • • • • • • • • •
- 1 few Tullock - bloogedly 215-	+
-+ Ith Day 25/15/1-1 196/198	9/ Grubb ''' : 38060'd
- Carlo Parry 20167-1-130.749	### v. Green ###################################
Come a Rooke Harrel retrocker.	Tackson 855
Contwell v. Byron karald 446	
Com v. Price .atidifica -861-	b. Knightlev
Coobying Wadsworth od 1 1 296:	- bad. Lawder
Cossier v. Clowes *********** .480:	a. Bewis v. Bingham 11 603 more
Cartoury 1008 - 10089	Mondalis et al. (1997) A.
Cross v. Pilling and Mograso 7 944:	Br 002 nither to a visual 200, 119
Cresse v. diametric reservation by mass	? - (ti) o . Meyrick take a seelin(⊈198 7)?
Commoderate Walls and Commoderate Walls	Pasquali
Continue Shadood G	Terreta Partenas vilantos Principalis
Cutaffeliam v. Laurander, 17	Pitt o Lamino and Carles
Color v. Powell vonc V 23 4381	104
Cross v. Chadley . Stomtes 259: 496	Powell v. Hill
hevel, y - Morris Sc9	
Steyney's case . C 4727	9. Ridout 618 mn
bilá a Afficek and Othera 🤌	Robson
Desputs, Reconnilla a valuate della	ਉ ਜੋ ਜ਼ਾਂ • Sayer ਪ੍ਰਤਲੇ ਜ਼ ੇ 856 ਜੋ
Described Smith 9850 & Ville	Britis
Desirate Tukes	1 Star Spensor 1 1 12 2 244
Daniel a North and a mater 1 teams	Stenneth
Dates Sparrier rmsh A . Shati	Ward a part of Last 784
Datid to Ellice 220() .495	- 48. Wartney villirit 1. 665 -
Davies v. Pearce	
v. Eyton "ausil 1024	Morris v. Underdown 393
Davis v. Reyner 809	v. Cook 396
₹0L, 1₹.	b

7,	
1957 January Williams and Market 1957 of Moore 1957 of Meyrick	Ekiparte Parker . omolinge 658 w
Hopley c. Fitzgerald aroom a 232	TO Richardson wived a find
Herlin Ellis dieneM " 951	LL Shright inter(Medad) (hold
Mosth a Percival . Hamale a 400	esellman Bourney dues 422 L
Hadrey Sandon Hamels 472 kg	Ult Stanbanaum seulf er telninisent
991 p. Nowell training a specific of the second of the sec	### South Grown of ACE Land ### Stephenson Wiles West and ### Ace Land
Batter 1. (aselerbon .c ward b. 118	Leading Manager 1 and Same
079 d. Shaw v. Roe mayer.	Usborner natural .3.——54
072 d. Spencer v. Coodwin senissi	- And Andrew Cale Miles 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1
602. d. Wells v. Scott wall 169 well	280 - William) inteller and the first note of the control of the
act d. Wheadon v. Dedoc : Volgati	Fignn 2108/05.1.1 979
Boulan v. Brett . Lood .; tred 254	Bion v. Russell nordoll bl498)
Downes v. Richardson B. a nemangal	CONTRACTOR CONTRACTOR
Rownes v. Richardson 11. 3 11595 W.	araham r., Whichess and Hull 619 n.
Divines v. Richardshire 11, 3 11595 with Dividey v. Ward Shada a shoot a shoot of the state of the shoot of t	Grant r. Bagge 706
Doff and Others v. Budd :: angaint	Faliman v. Ives usunible W . s -594
Tornand Others v. Budd 1. a. 1821 Thrombe v. Crist 1814. a. posnigatis Torna v. Hunter 710. (1. a. 1821) Duman v. Brigg v. wabi H. a. mengalis Duman v. Brigg v. wabi H. a. promigi L. Duman v. Budd v. b. d. promigi L. a. promigi L.	Estimouth (Earl) v. Miss A. 1 sevesti
27thk v. Hunter 71th 1 22763	Gety r. Cockson. sinner v 1989
Dimman v. Brigger Wabill of mail 1869	Fallkner v. Elger . resser re863
Dappa v. Mayor credit a grounded !	Festherstonhaugh v. Athinhon 1995 al
Total West India Company of Milates	Feltham v. Terry Clark. Unath v mantifel
	88enside, e. Bensteinno .v nozugist
v, (hapman 479	028 v. CarrinottavaT v1049d0
089 E. listens I r [Militar v. Delher Vround at - 889
Hilliam Position 17:5-978	Pilish v. Delher Vingard, cr. 839 123 — v. Delmer JuruH, a. 437 Pilher v. Miller ummaH. s. —260
Okskin v. Thom 1101 3 devil	908her v. Miller assurall s 960
Totaley n. Price :int) : 84914	·Flotther v. Braddy Magboll diffbal
Oddebon is third statement Manager	Los . Lord Sonder vi . 1 athift 691
Maley a Cookford blott . 1 2020 with	Ponteau v. Benneungel a commbel
Hoder 1900 1 Lletter 1: 20 Part 1941	Poot v. Marriott and Othells . 1 1922 1921
110 Valle VI	Wertick v. Barleybrarde . Pittardy-larle . Barleybrard
Sikin v. Thom 114 (1834). Circley v. Price ind) : 1944. Saft of Mansfield b. Sebit a noedsho Caley v. Crockford blott : 2224441 Saft india: Complete v. 021 Technique 18 12 India: Complete v. 338 n. Edwes v. Mocato 224500 (1210) 238 n.	Poster v. Blobenemskild v resent
Eaves v. Mocato 19.840after mg 255	1988 Prest, Wickernoaman, a - 30
Collin Part India Pattilant ublesto	Fowler v. Coster sting . 1 appropriets
Edie v. East India Company and 1990 Edwards v. Hammond 2011. 398 12910 W. Bröwn and Others 1996	
19010 base and Lander A. 390	Franklin, Ex parte
2 Probable 2011 17 18 18 18 18 18 18 18 18 18 18 18 18 18	la
SOC - Child Schill - coc	Freeman v. Jackson 811
9. Buchanan 97. 1664 108 9. Child 197. 633	1022 v. Moyes to if struch metter v. Freemannamant) . 474 v.
8aks C Ingriprime 1	
Cloring o. East India Company 642 n. Cloring o. Teed Charles o. Harding 793	Fromont v. Couplend
Tipord v. 1 eed	Fry v. Malcolm 25 16 458 654
Old Rins o. Harding.	Farnival v. Bogle obline H. 1 - 840
and Another's Harding, Genta 166	v. Boyle and Others 436
breaking of the state of the st	Tursdon v. Weeks Vanii
Diffwood v. Pearce parties product 9	Henry 2, Weigh and Co. Co.
Diworthy v. Bird 461	Harris Ha
OBmerson v. Lashid wind 1 288 554 V. Still v. Williams 261 Sevans v. Milliams 1 10 10 10 10 10 10 10 10 10 10 10 10 1	togory .
" Dures v. Widdowsoft '	Wale v. Capern 7751 Colb 866
Bony v. Collins	wandall v. Fontignyolog 16121646 h.
Torre v. Wynne	Carnett v. Willan 197910 .3.00201148
Evans v. Munkrey	Cramons v. Hestretti 1 90720 dagar 675
v. Roberts 679 n.	Carret v. Taylor stability
v. Williams ''' 729	Gates v. Ryan oznadal = 776
Everth v. Bell	Gerrard v. Aylmenquand .s.noqre47?
Ex parte Adney '' '' "'' ''' '''	Wibb v. Merrill o. U a natzni@21d.
Burton 4 Mill 1 Program 54	Wibson v. Minetamproff . rapeirre 250
Charles . 1 . 1 model 657	- v. Chaters diver . L yeltro 動 S
Day 1 (2) 158	BGilby v. Lockyer to get a street n.
Eicke, in te Harper 10 655	"Offes v. Grovere go. of T . Come 6 346
Julia - Paisabild at 11, 1519 - oak d	Achdetone a Underestrill
" You Day 1 201 question 155 " You Elicke, in te Warper 10 655 " Sale Fairchild 11 11 12 12 13 14 15 15 15 15 15 15 15 15 15 15 15 15 15	Blanvill v. Glanvill Partie? 1818 194
H前 2: 1041041 65b	Gleadow v. Atkin 480 and Mitt
101. Hill 22 22 22 655 Monro, this FraseParall 53	Gledstane v. Hewinh 1 915
	,

сітерім тивочогійне.

Geden vallurne envelopen 1944 Guff v. Davis envelopen 1974	Hapdon, y. Williams Hapley v. Fitzgerald Haplar v. Ellis Hoeth v. Percival Heetles v. Johnson Hegges v. Johnson Hegger v. Casebert, 4, 118
Guff v. Davis neebradeil 497	Hayley v. Fitzgerald 1000/
Good v. Chetzifmanni "Idginde _213_	Hayllar v. Ellis 951
Gradish v. Bowman dine: 472.L.	Month v. Percival
Gendright v. Moss seemedque510_ Gendrichte v. Duke of Chandes544_	Hemps v. Johnson 799 055
v. Furmucanation J191	Helier v. Casebert
Gerdon v. East India Company 982	Hellings v. Stexens 270
Godeg v. Goring yelomai 809.	Helyear v. Hawk
- v. Edwards nuvil - 555	henley v. Soper
Geeld v. Robson ilperoel 1 1224	MARDET II. COOK
Gowan v. Foster 775	
Graham v. Whichelp and Hull 619 n.	Hemson v. Heard Drawiff to mind
Grant v. Bagge 706	Mooks v. Keats him H. yellow
Conner a Amelai	Homson v. Heard brandill to such thicks v. Keats than 11 to such this gins v. Willen remained thin the Higginson v. Martin 1 to the thing in the thing is to the thing in the thing is to the things v. Warry the things v. Warry
Graves v. Aranidi, an (Iradi) antivon 1888. Gray v. Cookson. antionally as 1886 44	Hieran Warry
Green v. Prosser . Prof. L. 1911 1869	Higgs v. Warry
Greece no Jones	Higham v. Ridgway 2011 From the Highmore v. Primrose, 1912 1913 1911
Greening v. Clark	
Greenside v. Bensen in it is rozur 444	7: pany
Gregory v. Tavangnista() 820	v. Chapman 479
v. Gregory . a still the sales	v. Farnell 980
w.Harrill policien - 637	Hillary v. Rowles 173. 278
Gdfith Hadan	Habe a Poils and Francisco
Griffith v. Hodgen Abburd . 1961814.	Hobson w Middleton 474.
Griffiths v. Eylen brooks 864	Hodges v. Holder
Crissel v. Pole har marinali i 10089	Hodginson v. Hodgkinson 240, 861
Cottick v. Barleyhanny .4-bam 208	Hinst v. Pitt Hoby v. Built Hobson v. Middleton active in 128 Hodges v. Holder Hodges v. Holder Hodges v. Holder V. Walley 91 327
Gaichard v. Robertsunasiti .: 32% 4.	Hogan v. Jackson
Calliver.u. Wicket. went. 11.11 393	13c v. Shee 1. 1010
Gatteridge v. Smith 1980).41 1914736	Hogan v. Jackson Hogola 13 1000 (Holding an Impery 16 11 100 100 100 100 100 100 100 100 1
Frankling Equate 219	v. Pigetty could rebugged
He Hosier .H	Executors 470
Hagedom v. Reid , to the service of 1 110 11	1 od Executors 2 Akinson 307
Hate. Chapmannsappri	Hollins v. Donelly
Bomont v. Richardson, jo) . 1 tom 356	Hollis v. Carioge 1911 1912 1913 1914 1914 1914 1914 1914 1914 1914
les Sat Blandy	Holmes v. Coghill 26
0+5 v. Hollander mentl servini 393	v. Kerrison
v. Bedienang signed 329.n.	Horncastly v. Warran 500 Horne v. Lord F. Bentinck 590 n.
Balsey v. Halsey A. H. Ander 196	Horne v. Lord F. Bentinck 590 n.
Hancock v. Welsh and Cooper 941	Horton v. Inhabitants of Stamford
v. Podrere 444 r. Proud 51	Hoskins v. Knight
Shadley v. Levy . arragables shass	Hoakins v. Knight 350 Hotham v. East Indie/ Company 100 8. Hour v. Baker 100 8.
Hamis to Packer strong Alcon. 480	630 s.
Hanson v. Meyer nellill anna 291	Hour v. Baker 778 11778 Hovenden v. Lord Annabley 1180 180 180 190 190 190 190 190 190 190 190 190 19
Hargthorpe v. Milford H	Hovenden v. Lord Ampeley 201
Herman v. Anderson (v. 1 14 298	Howard v. Bartolozzi
r. Dickenson A. A 11.400	v. Wood
Harper v. Champneyly I habitative xii	Howe v. Nappier ; 19(1), 142
Marrison of Porement 11/2 of during 1	Hower v. Wood 154 Howe v. Nappier 154 Howse v. Webster 156 Howse v. Hancock 157 Hulbard v. Bagshaw 156 Hudson v. Revett 1602 n. Hull v. Chandless 602 n.
Marrison v. Poremanning single single St.	Wubhard v. Bagshaw 978
Hairey n. Clayton and the hard R1	Hudson v. Revett
Haswell v. Thorogood 100 6600n.	Hull v. Chandless 602 n.
Haws p. Haws of his Harris 1201202-1263	. — v. Heightman 612 л.
Haves v. Saundett antil) ktv. is 25	Home v. Paplos Charles 848
Marking v. Day well suches to	v. Liversedge 1017
v. Edwardel - vastefiel 956	Hull v. Chandless 602 n. v. Heightman 612 n. Hume v. Paploe 75 rest 2 848 - v. Liversedge 1017 Humphreys v. Pratt 684
	0.7



CITEDERSACHED TEMMENE.

Point v. StephenourundeO .: ellod884 Pointingtower v. Gardiner oll. 475 &	Kreile v Bromsallghinin nindska
Phorty v. Manglesoli W 442mini 296	king v. Wilson autor and 474.16
Mitrat o Parker buctil in 954	"++ v. Skeffington: i tooll
Vigner, 1) and 1, 2049	Kirloch v. Craig 927
Vorting thingral	Kinnersley v. Pine and the 941 M.
None British 684 m.	Kirkley u. Hoghson 1115 (1119 978
Indicio. Spilsbury agest. 1. 2 200 239	Knowles and others to Mitchelman
Isaacs v. Goodman 90	and others
Isherwood v. Oldkhow 195	Kobystra v. Lucas . and des 504 n.
Israel v. Benjamin 727	Mazeth c. Wilcons 420
259 v. Middleton no. A. Allen v. Middleton no. Allen v. Middleton no. Allen v. Allen no. Allen v. Allen v. Allen no. Allen v. Allen no. Allen v. Allen no. A	1 we of discont.
r. 0.0d Statem and the statement of the	Martin Marcin 180
	Lagaussade v. Whitemail 12. a con \$48
Opt. 1 (1) (648) J. 559	Ludbrooke v. James if not 404
Sackson v. Andersoneivell	Laidiaw v. Cockburn 2 . see at \$15
231 — v. Davison bel 177 . 2 180	Latin v. Massie
oto and others of Personal 180	Lanchester v. Frewer onvett. a rought
others 886	Lanchester v. Thompson and the clinic 230
v. Hesketh 672 n.	*** v. Tricker Jim?. a 22237
Incohe w Hart 500 -	Langev. Anderson minual 431
PIO - v. Latour 250	bangder v. African Company 684 M.
v. Phillips	Langton v. Humbes 1948-16
Jameson v. Campbell 659 n.	LadgeCox's Case 11 440
James n. Sewell and Cook 662 m	Linux m. Herodyssum
101 v. James 468	Leacroft v. Maynard: 486 Leadbitter v. Farrow. 342
Janson and others v. Willson 534	
Janneev n. Sealev Kin	Leghmere and others w. Blotcher 196
Jayne v. Price	Lee v. Muggeridge 11 477 &
Jekyll v. Morris 590 m.	Leek a Robinson 4 401
Jenney v. Audrews	Lefevre v. Lloyd S21. 474 h.
Junell v. Newman	Lempriere v. Pusley
Johnson v. Baker 601. 875	Lewis v. Eicke 280
v. Popplewell	v. G. Boulen Johns / Thirty of the
UN v. Sins vermine	were. Wallis ridgeste. confin
100k v. Wells (A.) 83q	THE Wallis subgester on the
vo Gabrielianii S98	v. Clement dans I a den Gie
The Lindsay	Lilley v. Whitney such a Has the bill
Jones v. Gibbon	Linden v. Hooper, gentk Toar my 1811
- Herbert ma mont in roll 1888	Lodge v. Dicas nothin H 1997497
v. Jones 224,602,875	Lagre, Fairlie
v. Kitchen ogren	Lyng v. Grenville and 745
walker 200	v. Grevilleone Al bro. 1774: 747
p. Stevens	Loveridge v. Coopers InsH vise54
Judd v. Judd	Lowe v Booth lon A. mala vinter
Judson v. Etheridge 250	Lowe v Booth and a make inter-
817	and another, assignees of
817 8.4 K.	Steward a bankrupt, v. Fair-
MARK TO THE PROPERTY OF THE PARTY OF THE PAR	lie and others 1/2 884
Nay v. Facoiman and others	Lord p. Houston, 1187 , 418
v. Whitehead	Lucking a Lonning
Kaye v. Cooke	Lucking v. Denning 406 Lyde v. Luke
v. Goodwin 126	
Kearslake v. Morgan	M. Janes
Kenneth v. Milbank no T bro I 129	Macdongall v. Charidge 451. 59
Kennedy v. Gouveia 179 Sennedy v. Gouveia 190 188	88 iand v. RecombyaH .v deoniseM
	I - Bonomno o f'eighabhliad'l a - 1990 id

CITEDOMATHIO COMEME.

Mission w. Moore 20 J. J. weilen
Masten s. Moore xo) .t. wait 973
Manin v. Partridgelsemort. v. 1974.
Manhail o. Foster nosted " 2095
Mitsack o. Ehis
Maidin of Downesself (Jane 1967)
Bilison v. Petit nochedla zele 8f
Martinion Globies and others and office Martinion
int a Knowles regular in 0.74
ex. Knowles right in 1974
Marzeth v. Williams 422
Massey v. Johnson I 966 n.
Masters v. Masters 480
Masters v. Masters 480 Misson v. Wharman . : pinesun342
Booth sand a second hoo
Matthews v. Saweiluddood v 64944
138 Vanie dies V 861 1380en ict I. Dickenhauft .v 32
v. Dickettone 1 191 16964
moror v. Payne 19 4211 .3 JOP 62464
More v. Payne regri' . 1 1909 and 284
Mirelles-s. Banainguar-bith 6944
Mallan qualition tensing of the 1984.
McMcweather w. Ninkmill . 1 10012684
Mc19 Weather v. Ninkur H . 1 0012683 Meredith v. Chute . 200) 27 47 44
Michig. Morris
Biller v. Parnellbrugysil: Horsell
Milner v. Crowdall tall . Control 1997
Miles residente and obtained leading the complete of the compl
Milchin v. Clementilia J = 776 Moffett v. Parons urbinggall. : 250
Boffet v. Parons achinegalle 1950
Mile of Reveal Exclusions Makes to all
ranfer Chapang. "Benil., 21450 Mole v. Smith Anleif er er eine 456
Mole v. Smith Valent in a much Section of the Secti
Millett v. Brayno isbid 1688'nd Mintgomery wiWoodleyd D 1 599
a Address Police 1984
Mibre v. Meagher sills !! . Moo.
m. Ashby 1964. 1889 n. Mitter v. Meagher 2014 / 1889 n. Mitthind v. Leigh 2014 / 1866 n. Brydges vontil / 1866
Mitgan s. Brydges vental / 3 2786
THE COLUMN TO COUNTY TO THE COLUMN TO COLUMN T
Matte v. Lones sloud is stand
Mercian a. Hamilton 2001 is 21894
Minaria s. Levy office 1 (1382)
464 t. (upnville, spoper - 2464
Mobil 95 Lord Plymouth 24 3 452
Mocely v. Hanfordspoo : Daligna
Montstephen v. Brookstevil 1987
lic and others
With a Tallock : pot-not ked tarel
188 N. vendro bara sil 1848 v. Tatlock (cornol 664 1973) 1848 v. Tatlock (cornol 664 1973) 1848 v. Tatlock (cornol 664 1973) 1848 v. Tatlock (cornol 674) 1848 v.
males 9304 1 1971
Wasta a Dantes 610
Nelson v. Salvador 431
MOCOULAB t. Charidge nigrafiae asm.
Mawland v. Reevesby BH .u deoinio65
Eschamus v. Cricketellado, v alabile

Merys v. Humpitensil ... svendili Misholls v. Osbournensnique? , v 1401 Nicol v. Boyonibu sk. i wasagun 861 Nightingale v. Wilcosom: V. . . 1047 Norris v. Daniel •• Novello v. Toogood 37 Nixon v. Bronan ... 684 m. Jona C. L. Janet Isher to 12 19 40 me. Israel > Retricts 601 O'Brian v. Saxon. 778 Oldham v. Allen Avaidatella 3 -318 Oliver v. Lord W. Bentinck 590 n. 642 Orme v. Young 559 . . Diborne v. Davisnoessbules nordoda w. Walladen : vii(Los . - 151 Outramano Molestond din has --- 940 886 - r. Heskeilff. 672 n. Parker v. Gordon
Parker v. Gordon Patter v. Thompson (2007) A 2001000 Petitison c. Jones 2001010 at 1990 Periode v. Acton 2001010 f. at 1990 Periode c. Bell 2001010 f. at 1990 periode v. Rhodes 201010 f. at 1990 periode v. Rhodes 201010 f. at 1990 periode v. Rhodes 201010 f. at 1990 petity word v. Cook 201010 f. at 1990 petity word v. Prinzle 201010 f. at 1990 petity word v. at 1990 petit Patten v. Thompson ()... Péttywood's Cook
Pétigrew v. Pringle andri ... 439
Philips v. Biggs / Ashrid ... 489
Philips v. Hunter moddi a 3999 Philips v. Eamer and motion of the Philips v. Eamer and motion of the Philips v. Scultherpe and M. 1819.

Philips v. Scultherpe and M. 1819.

Philips v. Scultherpe and M. 1819.

Philips v. Shew

Philips v. Handax

Ibidas. Van Miller, blut Ludder. Fifter v. Fage ogberd v. Edding v. Fage ogberde Plummer v. Savage Polhill v. Walter ... 218 338 Pomeroy v. Partington 191 Popplewell vi Wilson Banishad 191 Porter v. Shepherd Banishad 1918 Pomeroy v. Partington Powell and others v. Sondett and 3 150 of the son of th enceth v. Milbankroff brol. v 179 enceth v. Gouvers Type Cruzes encety v. Gouvers 222 v. Dyer

ANAMES OF CASES

WAST	TO SAMKALE.	CASES
MAII	Toddart v. Joinson H. J. S.	Rex v. Tucker namus 660 as 851 v. Watson 570 as 661 as 51 v. West Cramore of the 651 v. Worfield color
Price & Mitche	all Admin page 413	Tceble man land
n Edmon	ds : 10000 1 4721	ock Watson 666 n. 851
Boe Boe	vev of a standard 188	West Cramore 570
Principal of Poinclos	10h 539	Williams Williams
Print D. Pantolo	797	v. Worfield 610 v. Undertakers of Aire and
Processing to M.	325 n.	Tadastakers of Aire and
Pocklord v. M	g axwell and a state of the sta	v. Undertakten voll 924 n.
Pugh v. Room	577	Calder Navigas of St. Peter's
Parvis v. Raye	Studency Pearson P	v. Undertakers of Aire and v. Undertakers of Air
559	The state of the s	Liberty, 1 ork
reso :	Summers E. Mosek	Rhodes v. Innes 1197160 .9 1738
Owick v. Cople	Control of Ellison	Rhodes v. Innes Ribbans v. Crickett 1911 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1
U-1		Rickman v. Carstairs do 99
P69	RadduH 1 -	Ridout v. Bristow 324, 429 Ridsdale v. Newnham 53
124.	Imber day of 1551	Ridsdale D. Newittaniya
Rackstraw v.	v. Harcourt and 86	- v. Lewis toleraT = boow 855
Ramsbottom	66 Managana	Right v. Beard to Hart) a vinder 191
Bawden .	hes 479 e.	v. Thomas dame for 655
Rann v. Hug	hes	Riley v. Burn mantinizing 1 460
Ravenscroft i	False 913 n.	v. Byrne palau A a intal 849
868 35VI.	v. Eyles 1023 a. 1023 a. 1023 a. 1023	Rivers v. Griffiths 606 n. Robson v. Hall 218
Read u. Mon	igomer y 1023	Robson v. Hall
v. Hutc	hinson Taller To nort 307	Robinson v. Elsam 1994 1 1994 452 Eland Sultons Bus 500 n.
Rawson v. V	Valker Birthill of Michigan	50 poli Stal Tadions hou 590 n.
Redpath v.	Roberts Jandatti vi Bos	Wullett 81
Reech v. Ke	nnegan 606 a	0. 111111111111111111111111111111111111
Reed v. Dee	Valker interest of the control of th	Robertson v. Score 268 Rochfort v. Robinson 393
v. Jam	nes 16	6 Rochfort v. Robinson and 393
- 9) JOH	C3	Roe v. Fladd 395 664 664 8 8 8 8 8 8 8 8 8 8 8 8 8 8 8 8
Regina v. V	Veston Manie 562	v. Harvey ENECT 1 569
Reid v. Lor	d rentaliants of	
v. Re	noll mode w 77	7 Ward vnoi 590
Robinson v	Bayley og ni 1 - 34	Rogers v. Clifton Smull is 58
Rex v. Add	lington whall if 567	
7 10 Ba	mpton notation 1 50 66 yeley manufact a right of the state of the stat	Rose v. Blakemore banW 20
100 v. Ba	yley mannot a sigis	n. Ross v. Ewer Rouveroy v. Alefson 11 259
ear v. Be	at the same of the same of	45 Rouveroy v. Aleison alinii 259
920 v. Br	uce dound a spare	66 Row v. Dawson memmull in 88
West oren.	date 1	
WEUL V. Br	ooke sawaH:4 8	Rowland v. Veale 116 116 Robery v. Stevens 20 H 2 200 365 n.
		n. Rubery D. Stevens 2001 2 200 565 n.
0. C	astell 694	n. Stephens 978
Pa	roke granicali i 650 avis noscial A o nosquis	Rufford v. Bishop government 1978 Rugg v. Minett siddle bits 118 505 Runcorn v. Doe
612 p. D.	avis mosniki a mosnika	143 Rogg v. minerty mindto bas 1505
STOT 0. E	aton brod a	
		538 Byall v. Rowles
T. E.	Little (0.41212.7 7 ***	Ryalls v. Emerson Will A broller
		8 m. 154 S. tetan 1 .0 217
WOI- 0.		851 Sabourin v. Marshall and others 923 n.
D. J	Ollingon White Over 10	Sabourin v. Marshall and others 304 Saffery v. Jones Gring J. 1 101 1545 Salte v. Thomas Gring J. 1 101 1545 Sannel v. Howarth July v. 1 201 1556 Sannel v. Howarth July v. 1 201 1556 Sannel v. Howarth July v. 1 201 1556 Sannel v. Wine J. 1 101 1545
N 14 D. A	duris will a series	163 Sahery V. Johns William 545
220 v. I	Desker a desker a	Salte v. I Bonnas
20 U.	Parker 197011 d he man	851 Samuel v. Howard and all . G norship 224
01: v.	Netherthong a northware Parker 199010 of taken Plumer track 2 ya Reeks 2007 wall a re Harvey llawof ver	Sarel v. Wine Sanders v. Freeman award 623 Sanders v. Freeman award 828 Sanderson v. Judge Scarth v. Bishop of London 599 n. S. C. Kennerley v. Nash Schuldam v. Smith Scheibel v. Fairbrain and another 911 Scheibel v. Fairbrain and another 911
(114 D.	Reeks of twal a sell Harvey lawed or Richardson of a candle Ringwood of a candle Sutton and a candle Smith and a med	346 Saunders v. Ludge M. a nam 418 n.
015 V.	Dishardenn (7	743 Saunderson of London Mand 886
8T-1 0.	Diagraphy Cl a dagnin	570 Scarth v. Dishop Wash . 599 n.
VEC 0.	692.719	892 S.C. Kennerley of doio.1 of thew 396
17.8 0.	Series Surride a pani	456 Schuldain V. Sairbrain and another 911
100 0.	Chair	692 Scheibel v. Partidativi 4 660 n.
D.	Smith mad a med Shaw Middleses	235 Scott v. Ambrose 660 n.
Section 10.	Shaw Sheriff of Middleses and	

Sent a Marshall mage 164	Stoddart v. Johnson page 745
Scott v. Marshall noge 164	Stone v. Rawlinson Stone v. Rawlinson
Seeman's case	Stokes v. Conner
Senton in Bonnediet Horlin 755 745	Stanehouse v. Ronieden (1919aba
Sedemorth n Organish 117	Stone v Whiting
Sees a Hind Statistic 570 m	Standhton v. Dan
Seton a Seton	Should at Brania
dectal vi Selon to spidarshi I was	Street n Blai
Shannan Bardinian Caples	Storoge v Danson
Sham a District of Property of the Property of	Stoddart v. Johnson Stouc V. Rawkinson Stokes v. Cooper Stokes v. Cooper Stone v. Whiting Stoughton v. Day Stoveld v. Brewin' Street v. Blay Sturgess v. Pearson Stukeley v. Butler 532
Tutherlaigh die / Tithed Co	Summers a Mosele
Sheep a Garrett	Summers of Courses
Shapherd a Jugram	Specions of Ellison
Scott v. Marshall 1520 1664 - V. Surman 91d 356 Seaton v. Benedigt 155, 748 Sedgworth v. Overeign 15 15 700. Seton v. Selon 25 16 16 16 16 16 16 16 16 16 16 16 16 16	- # Hubbard #60
Shelly's Case World - Indias	Sutton v. Burgess 961
Shelly's Case Shepley v. Davis Sherwood v. Taylor	Soft a Clark . Itil
Sherwood a Taylor 11/9.1	Selected Militabilly of motividemak
Shrewshury's (Farl of 1 Case	Stukeley v. Buller
Sherwood v. Taylor Shrewsbury's (Earl of Case Simpson v. Smith Simpons v. Folkingham	T. T. L. Dillett
Simons r. Folkingham	
Signons v. Folkingham Slackford v. Austen	Tanner v. Smart . 176. 958
	Tamer v. Smart Tarling v. Baxter discharge Tarling v. Baxter discharge Tarling v. Baxter discharge Tarling v. Baxter discharge Tarling v. Hisher Tarling v. Hisher Tarling v. Hisher Tarling v. Cole Tarling v
Slater v. Lawson H. H. Sleat v. Fagg	Tarlton v. Fisher 795
Slobey v. Heyward and others 299	Tatlock v. Harris 197 " nuewest
Smith and another v. Dilson 190	Tale v. Hibbert 211 stoll discovery
- v. Bickmore . 249	Taw v. Bury done
v. Everett 258	Taylor v. Chapman 6184
r. Barrow 3007 . The street 331	108 - r. Clow 232
v. Bromley 683	% Cole 500 3 864
and others v. Clarke 419	b. Higgins ators a company
v. Davis	v. Hipkins 657 %.
Steat v. Fagg Sipbey v. Heyward and others v. 99 Smith and another v. Wilson 190 v. Bickmare 17 v. Everett 1902 v. Barrow 1902 v. Bromley and others v. Clark v. Davis and others v. Dovies 472 k. v. Forty	- v. Shum
	v. Gregory 1
v. Horne 137	v. Baker 910
r. Raleigh 615	v. Robinson 977
v. Ward 91	Taylors v. Johnson 401
v. Whalley , 458, 655 n.	Terion v. Mars 759
v. Hallett 1003	Thomas v. Bishop 372
v. Rummens 964	- e. Cook 615. 619 n.
	Tenon v. Mars
Snowball v. Goodricke 161	and another v. Court-
Solomons v. Ross	may 709
Sollers v. Lawrence 404 S. P. Huddleston v. Johnson 619 u.	v. Heathorn 52
Service and others periods	Thompson v. Atkinson 219
Spratt and others, assignees, v.	v Bond
Hobbouse	Dicas 173, 270, 233, 649
Stafford v Clark	Thomson v. Pheney 815
Stag p. Punter - 441	- Wilson . 618 n.
Stamford v Davies 910	v. Wilson 618 n.
Stammers r. Divon	Thornton v. Hornby 942 n.
Stag v. Punter Stamford v. Davies	Throgmorton v. Wherhouse 622
Stanley v. White	Tidmarsh v. Grover 88
Stapleton v. Macher	Tilpey v. Morris 116
Steel v. Brown 874	Tollers v. Lawrence 410
Steinman v. Magnus	Prima a Possell
Stephens v. Llowd 599 n.	Tomlinson v. Digitton
v. Badcuck	Tomkinson v. Russell 357
Steward v. Lomb 875	Toogood v. Spyring 851
Stein v. Yglesias 479 h.	Topham v. Dent 301
Stevens v. Wilkinson 4721	Towsey v. White 834 Trappes v. Harter 673 n.
Stiles r. Coxe 831	Trappes v. Harter 673 n.
77	

XXIV NAMES OF CASES CITED IN THIS VOLUME.

Trapp s. Spearman ps	ge 89	Whally v. Thompson p	age 504 m.
Treacher v. Hinton	776	Wharton v. Walker .	_ A.o.
	565 m.	Whippy and another v. Hill	
Transfer II II	809	Whitcomb v. Whiting .	
Trevor v. Wall	405	Whitehead v. Clifford .	
The transfer of the transfer o	418 n.	Whitehouse v. Frost	. 293
T-1-1 37:!	760	Military Sell From	0.4
The same of the sa	219		
7 •			
m · n	421	337501	400
Twigg v. Potts	877	TREE: 1	
v .		1111111	. 53
Valliant v. Dodemede (676 n.	l n · "	
			. 635 n.
Vansandau v. Brown	416	Willett v. Pringle	
Vanchamp v. Bell	396		. 257
Vaudevelde v. Liuellin	793		. 611 m.
Veale v. Gateson	51		. 720
U.		Willis v. Newham	177. 960
Uncle v. Watson	E 4 E		. 400
	545		. 250
Usher v. Dansey	369		. 259
w.			. 822
Waddington - Page 1	coc		. 119
	606 n.		. 856
Wadley v. North	396		. 472 d.
Waley v. Pajot	249	Winch v. Keeley	259. 474
	ı. 848	Wolley et al. v. Cobbe et al	
Gent. one &c. v. Rush			. 624 n.
bury Gent. one &c	86	Winks v. Hassall	
v. Gardner	45	Winn v. Ingilby	
- v. Rawson	743		33
v. Rusbury	790		. 151
v. Witter	765	Woodbridge v. Spooner S	07. 47 2 c.
v. Earl Grosvenor	341	Wood v. Vcal	. 505
Wallace v, Breeds	2 93	Woolley v. Sloper	. 224
v. Woodgate	249	Woosnam v. Price	. 58
Wall v. Nixon	305	Wormwell v. Hailstone .	. 237
	619 m.	Woodward v. Glassbrook .	. 400
Warren d. Webb v. Grenville	539	Wright v. Lord Dorchester	54
Waterfall v. Globe	69	v. Meyer	. 81
Watkins v. Philpotts	255	v. Ruttray	. 504 n.
	738 n.	l —— v. Snell	. 143
v. Hewlett	924	——— n Dickson	. 356
Waugh and others v. Russell	27 2	v. Hall	. 394
Weatherby v. Goring	2 75	Wyborne v. Ross	. 658 m.
Webber v. Maddocks	598	Wykes v. Shipton and anoth	per 943
v. Venn	818	х.	
Webster v De Tastet	629		
Welch v. Pribble	956	Ximenes v. Jaques	. 249
Wentworth v. Bullen	459	Y.	
	47 2 e.		
	. 3 68	Yate v. Willan	•
Weston v. Fournier	278	Yeutes v. Groves	. 258
Wetherell v. Jones	947	Yockney v. Foyster .	. 886
		•	

TO THE BINDER.

The Regulæ Generales, at present prefixed to Part 1, and consisting of pp. i.—xx., are to be placed after 3 Y, immediately preceding the Index.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURTS OF EXCHEQUER OF PLEAS

AND

EXCHEQUER CHAMBER.

17

Michaelmas Term,

IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.

REGULA GENERALIS.

Michaelmas Term, 4 Will. 4.

1833.

IT IS ORDERED, That where a defendant is arrested upon an alias or pluries capias, issued into another county, pursuant to the rule *Michaelmas* term, 3 *Will.* 4. s. 7., the defendant must put in bail in the county where he was arrested.

(Signed by all the Judges (a).)

(a) Read in Court, November 22, 1833.

OF ORE EINDER.

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1833.

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DARLING against GURNEY and Another.

la sere facias CCIRE facias on a recognizance of bail, against on a recogni-nunce of bail. defendants as bail of Tarlton. The demurrer book set forth the roll entitled, Pleas before the stated by way Barons &c. in Trinity term 1833. Then as follows: er memorran-Middlesex to wit. Be it remembered, that heretofore, watter intend- that is to say, on 13 April 1833, Darling, a debtor &c. ni to be a decame before the barons &c. by G. K. his attorney, and brought then here into court his certain bill against brought in his R. Gurney and S. II. in a plea of debt upon a re-3... in a plea er debt en a cognizance, the tenor of which said bill follows in mangnisance, these words, to wit: "Middlesex to wit. Be it rememthe tenor of which kill folbered, that a writ of his present majesty under the ions in these werds, to wit: seal of this Exchequer, by the consideration of the " Middlesex to barons here, issued in these words, William the Fourth remembered &c. (here followed the first writ of scire facias, tested &c." stating Michaelmas term 1833, which recited the recovery by the two writs of sci. fa., the the plaintiff by judgment of the court in that Michaeltirst of which mas term, against J. C. Tarleton, for 503l. 13s. 8d. damages in assumpsit, and the recognizance of bail of party bailed. the defendant and S. H. of Trinity term 1833, and l'len, no ca. sa. the return of nihil to the sci. fa.) The alias sci. fa. principal. Rewas then stated (as in Tidd's Forms, 5 ed. 507.) and plication set

forth ca. sa., and stated it to be directed to and returned by the sheriffs of London. Rejoinder, that the original action was brought and the venue laid in Middlesex, and not in London. Surrejoinder raised an issue that the original action was brought and the venue therein laid in London, concluding with a verification. Special demurrer thereto, assigning for cause that it should have concluded to the country:—Held, that the surrejoinder was good, as it did not necessarily follow that the action must be said to be brought in the county where the venue was originally laid, for by change of venue the proceedings in the action may have been elsewhere; and 2dly, that the commencement of the declaration improperly stating that a bill was brought in &c. might be rejected as surplusage, after pleading over to it, as the objection had not been taken on special demurrer to the declaration.

A party who demurs specially to a subsequent pleading, e. g. a surrejoinder, may, on the general words of the demurrer, impugn a previous pleading, e. g. the declaration, though he has pleaded over to it, if the objection is duly stated on the margin of the demurrer book (a).



⁽a) As to this, see now Reg. Gen. Ilil. 1834, No. 2. p. i.

the return of the sheriff that he had given notice to defendant and S. H. to appear before the barons at the time and place &c. The defendant's appearance was then stated. The prayer of execution for the damages—imparlance to the bill and prayer of plaintiff, that defendant and S. H. may answer him in the premises. Plea, no ca. sa. against the principal duly sued out and returned. Replication, setting forth the ca. sa. and that it was directed to and returned by the sheriffs of London; verification by the record. Rejoinder, that the action against the principal was brought and the venue therein was laid in the county of Middlesex, and not in the city of London, into which the ca. sa. had issued. Surrejoinder, that the original action was brought and the venue therein was laid in the city of London: concluding with a verification by the record. Demurrer, alleging the general causes as usual, and also for special cause thereof, that the matters alleged in the said surrejoinder, for the purpose of obtaining the judgment of the court herein, for the said plaintiff having execution adjudged to him as aforesaid, being partly matters of fact and partly matters of record, the plaintiff should have concluded the said surrejoinder by praying that those matters should be inquired of by the country, and not by a verification by the record. Joinder in demurrer.

DARLING
v.
GURNEY
and Another.

Archbold for defendant was heard in Trinity term last in support of the special causes of demurrer. The action was brought in Middlesex, for the writ of summons, which since the act for uniformity of process is the commencement of the action (a), was issued into that county. That writ does not appear on the record at all. Then the question whether the action was brought

⁽a) Alston v. Undershill, ante, Vol. III. 427.

DARLING
v.
GURNEY
and Another.

in London, is matter of fact triable by the country, and not by inspection of the record. The replication admits the ca. sa. to be issued into London, but that is irregularity only. [Lord Lyndhurst C. B. Suppose the venue to have been changed from Middlesex to London, and the action to have proceeded in London, the county to which it was changed. I do not assent to the proposition that the action must necessarily be said to be brought where the venue was originally laid.]

Archbold then impugned the declaration, on the general words of the demurrer; but the court, after adverting to Serjt. Williams's note in Duppa v. Mayo (a), doubted whether the defendant having demurred specially to the plaintiff's surrejoinder, should afterwards be suffered to object to a previous pleading of the plaintiff for a defect in substance; but finally refused to hear the argument, on the ground that the objection intended to be argued had not been placed in the margin of the demurrer books. On another day in this term, at the pressing instance of counsel, that objection was permitted to be duly stated on the demurrer books, and was argued by

Archbold for the defendant. The court has no jurisdiction by bill in scire facias as here laid, and the declaration should have stated, that the plaintiff declared in scire facias. The only record in scire facias is the award of two writs of scire facias, which should be stated in the past tense throughout the record. Here, it is stated in the present tense. This is neither roll, record, nor entry in scire facias. A bill cannot be that record, and though such an instrument is here pleaded to have been brought in, that is not the act of the court, for before 2 Will. 4. c. 39., a bill was a complaint in writing of a cause of action against a defend-

ant being before the court on its process. Nor, since it is so entered on the roll, can it be rejected as surplusage or denied to have issued.

DARLING
v.
GURNEY
and Another.

Lord Lyndhurst C.B.—The averment of bringing in the bill is impertinent and inconsistent with the matter afterwards set out. That matter is, however, in the absence of a special demurrer, equivalent to the usual statement, that the king sent to the sheriff his writ close in these words &c. (a).

BAYLEY B.—Had this record begun by stating, Be it remembered that the scire facias issued, as is here done, without the incumbrance of the slovenly and inconsistent matter prefixed to it, it would have alleged all that was necessary, and would without doubt have Now that preliminary matter may be treated as surplusage, as there is no special demurrer to the declaration on that account, and the defendant has pleaded over. It is clear that the plaintiff brings in a document which is in reality a transcript from the roll of scire facias, and no bill, though erroneously called such. The first writ of sci. fa. reciting the judgment against the principal, and the alias sci. fa. are duly stated, though prefaced by an informal and impertinent averment. Instead, however, of objecting to that on special demurrer, the defendant pleaded over, treating it as a declaration in scire facias. demurrer to the surrejoinder cannot be sustained, and the time for impeaching the declaration by special demurrer, for the ground to which we have adverted, is passed; so that our judgment must be for the plain-The other barons concurring,

Judgment for the plaintiff.

Busby was to have argued for the defendant.

(a) See declaration in sei. fa. Tidd's Forms, 5 ed. 512.

1833.

STEPHENS, Clerk, against Pell.

The first count A SSUMPSIT. The first count stated, that before the making of the promise and undertaking of the stated that plaintiff had defendant hereinaster next mentioned, the plaintiff had lawfully distrained for lawfully distrained upon certain effects theretofore of 350l. due for rent, on the ef- one R. Lord, against whom a fiat in bankruptcy had tects of one L., issued, and of whose estate and effects the defendant against whom a fiat bad then claimed to be assignee for a certain sum of money, issued, and of to wit, the sum of 350l. then due to the said plaintiff, whose estate defendant for rent of certain premises, whereon the said effects claimed to be had been so distrained by the said plaintiff as aforesaid, assignee, and had put a perto wit, in the county aforesaid, and the said plaintiff son in posseshad before that time there put a person into possession sion thereof; and that in of the said effects, who at the time of the making of consideration the said promise remained in possession thereof, to wit, that plaintiff, at request of in the county aforesaid, whereof the said defendant defendant, would withthen and there had notice: and thereupon heretofore, draw the said to wit, on 4 September 1832, in consideration that the person so put into possessaid plaintiff, at the special &c. of the defendant, would sion, defendwithdraw the said person so put into the possession of ant, claiming to be assignee the said effects under the said distress, he the said as aforesaid. undertook that defendant, claiming to be assignee as aforesaid, underthe said sum took &c. that the said sum of money should be paid to should be paid to the plaintiff the said plaintiff out of the produce of the sale of the out of the prosame effects: And the said plaintiff avers, that he, conduce of the sale of the

same effects. Averments, that plaintiff did withdraw the person from possession, and that defendant took possession; but though a reasonable time for sale of the effects and for such payments had elapsed, did not pay the said sum to the plaintiff.

Plea, that before detendant's promise was made, a fint in bankruptcy was issued against L., under which L. was found a bankrupt, and defendant was appointed his assignee. That defendant was only interested as such assignee in procuring the distress to be withdrawn, and that after making the promises declared on, and before a reasonable time had elapsed for the sale of the effects in the declaration mentioned, the fiat was duly superseded, and the defendant was afterwards unable to sell the said effects and pay the plaintiff out of the produce, and gave notice to the plaintiff of such inability, whereby the defendant was discharged from performing the promises in the declaration. Held, on demurrer, that the defendant's promise was unqualified, and that the plaintiff had relinquished his rights in consequence of it, and was entitled to recover.

Semble, the plea was bad, for not disclosing that the defendant had not sold before the flat was superseded.

fiding in the said promise and undertaking of the said defendant, did then and there withdraw the said person, so put into the possession of the said effects under the said distress, from the possession thereof, and that the said defendant then and there took and had possession thereof: Yet the said plaintiff in fact saith, that although a reasonable time for the sale of the said effects and the payment of the said sum of money out of the produce thereof hath long since elapsed, yet the said defendant hath disregarded his said promise in this, to wit, that the said sum of money hath not, nor hath any part thereof, been yet paid to the said plaintiff out of the produce of the sale of the same effects or otherwise, and the same sum of money still remains wholly due and unpaid to the said plaintiff.

Second count. That in consideration that the said plaintiff, at the request of the defendant, would withdraw a person before that time put into and then in possession of certain effects of great value, to wit, of the value of 5001., and then being upon certain premises in the occupation of one R. Lord, under a distress for a certain sum, to wit, the sum of 350l. then due to the plaintiff for interest reserved as rent, he the said defendant undertook &c. that the said sum of 3501. should be paid to the said plaintiff out of the produce of the sale of the same effects: And the said plaintiff avers that he, confiding &c., did then and there withdraw the said person so put into the possession of the said effects under the said distress from the possession thereof, and that the said defendant then and there took and had possession thereof: Yet the mid plaintiff in fact saith, that although a reasonable time for the sale of the said effects and the payment of the said last-mentioned sum of money hath not, nor hath any part thereof, been yet paid to the said plaintiff out of the produce of the sale of the same effects

1833.
STEPHENS
v.
Pell.

STEPHENS v.
PELL.

or otherwise, and the same sum of 350l. still remains wholly unpaid to the said plaintiff.

Third count. That in consideration that the said plaintiff, at the request of the said defendant, would withdraw a person before that time put into and then in possession of certain effects of great value, to wit, of the value of 500%, wherein the said defendant claimed to be interested as assignee of the estate and effects of the said R. Lord, under a distress for a certain sum, to wit, the sum of 350l., then due to the plaintiff for interest reserved as rent for and in respect of the premises whereon the said distress was so taken, and which then and at the time of the said distress were occupied by the said R. Lord, by the sufferance and permission of the said plaintiff, he the said defendant undertook and then and there promised the said plaintiff that the said last-mentioned sum of 350l. should be paid to the said plaintiff out of the produce of the sale of the said last-mentioned effects: And the said plaintiff avers, that he, confiding &c., did then and there withdraw the said person so put into the possession of the said effects under the said distress from the possession thereof, and that the said defendant took and then and there had possession thereof. Breach as in first count.

Fourth count. That in consideration that the said plaintiff, at the request of the said defendant, would withdraw a person before that time put into and then in possession of certain effects of great value, to wit, of the value of 1000l., under a distress for a certain sum of money, to wit, the sum of 350l. then due to the plaintiff, and upon which said last-mentioned effects the said plaintiff had before that time lawfully distrained, he the said defendant undertook and then and there promised the said plaintiff that the sum of money for which the said plaintiff had lawfully distrained upon

the said last-mentioned effects should be paid to the said plaintiff out of the produce of the sale of the said effects. And the said plaintiff avers, that he, confiding &c., did then and there withdraw the said person so put into the possession of the said last-mentioned effects, under the said distress, from the possession thereof, and that the said defendant then and there took and had possession thereof, and that the said plaintiff had lawfully distrained upon the said last-mentioned effects for a large sum, to wit, the sum of 350%. Breach as in first count.

Fifth count. That in consideration that the said plaintiff, at the request of the said defendant, would withdraw a person before that time put into and then in possession of certain effects of great value, to wit, of the value of 500%, under a distress before then lawfully made by the said plaintiff for a certain sum, to wit, the sum of 350l., he the said defendant undertook and then and there promised the said plaintiff that the said sum of money should be paid to the said plaintiff out of the produce of the sale of the said effects. And the said plaintiff avers, that he, confiding &c., did then and there withdraw the said person so put into the possession of the said last-mentioned effects, under the said distress, from the possession thereof, and that the said defendant took and then and there had possession thereof. Breach as in first count.

Plea, that after the 11 January 1832, and before the making of the said several promises in the said declaration mentioned, to wit, on 8 August 1832, in &c., a certain fiat in bankruptcy was issued, according to the provisions of an act of parliament passed in the reign of our lord the now king, intituled, "An Act to establish a Court in Bankruptcy," by and under the hand of Henry Lord Brougham and Vaux, then being lord high chancellor of England, not directed to the

1833. STEPHENS v. PELL. 1833.
STEPHENS
v.
PELL

court of bankruptcy, but directed to certain persons duly returned to and approved by the said lord high chancellor in that behalf, according to the provisions of the said act, purporting to authorize a certain person who had theretofore, to wit, on the day and year last aforesaid, in the county aforesaid, petitioned the said lord high chancellor for such fiat against the said R. Lord, and had then and there stated in the said petition that the said R. Lord was a trader subject to the bankrupt laws, and was indebted to such person in a sum exceeding 1001., and being so indebted, and such trader as aforesaid, had committed an act of bankruptcy to prosecute his, the said petitioning creditor's complaint contained in his said petition, against the said R. Lord, before the said persons tó whom the said fiat was so directed as aforesaid: And the defendant further saith, that after the issuing of the said fiat and before the making of the promises in the declaration mentioned, to wit, on the day and year aforesaid, in the county aforesaid, the said persons to whom the said flat was so directed as aforesaid, having severally and respectively duly taken the oath prescribed and appointed to be taken by commissioners of bankrupts acting as such commissioners elsewhere than in the court of bankruptcy, did find that the said R. Lord, since 14 July 1832, had become a bankrupt within the true intent and meaning of the statutes in force concerning bankrupts, and before the date and issuing forth of the said fiat, and did then and there adjudge the said R. Lord to be a bankrupt accordingly: And the defendant further saith, that after the said adjudication and before the making of the promises in the declaration mentioned, to wit, on 3d September 1832, at a certain meeting duly held according to the provisions of the statutes in force relating to bankrupts, the defendant was chosen and

nominated by the major part of the creditors of the said R. Lord present at the said meeting, who had proved their debts against the estate of the said R. Lord, to be the assignee of the estate and effects of the said R. Lord, and that the defendant then and there accepted the trust of the said office of assignee: And the defendant further saith, that before and at the time of the making the promises in the said declaration mentioned, the defendant was no otherwise interested in procuring the said several distresses of the plaintiff in the said declaration mentioned to be withdrawn from the said several effects in the said declaration mentioned, than as such assignee as aforesaid, and for the benefit of the said estate; of all which several premises the plaintiff at the time of the making of the said promises in the said declaration mentioned had notice: And the defendant further saith, that the said several effects in the said declaration mentioned, at the time of the making of the said promises, to wit, in the county aforesaid, were the goods of the said R. Lord, but were then and there supposed by the plaintiff and the defendant to be the goods of the defendant as such assignee as aforesaid, and that at the time of the making of the said promises it was then the intention of the defendant (which intention the plaintiff then and there well knew) to sell the said several effects as such assignee as aforesaid: And the defendant further saith, that after making the said promises, and before a reasonable time had elapsed for the sale of the said several effects in the said declaration mentioned, to wit, on 1 October 1832, the said fiat against the said R. Lord was duly superseded by the court of bankruptcy: And the defendant further saith, that the said fiat was not obtained by the said petitioning creditor at the instigation or with the consent of the defendant,

1833.
STEPHENS
v.
Pell.

1833. STEPHENS v. Pell.

and that he the defendant was not in any manner privy to the petitioning for the said fiat, or to the procuring of the same to be issued, and that at the time of making the said promises in the said declaration mentioned, the defendant was wholly ignorant of any cause or reason, matter or thing, why the said fiat should be superseded, and that the defendant's said ignorance did not arise from any negligence or other default in him, the defendant: And the defendant further saith, that he did not procure, or in any manner attempt to procure the said fiat to be superseded as aforesaid, and that he, the defendant, always used due care and diligence to prevent the said fiat from being superseded improperly: And the defendant further saith, that by virtue of such supersedeas as aforesaid, he, the defendant, was after the said supersedeas unable to sell the said several effects and to pay the plaintiff out of the produce of such sale, and that after the said fiat was so superseded as aforesaid, he the defendant was by virtue of such supersedeas deprived of all power and control over the said several effects: And the defendant further saith, that before the commencement of this suit, to wit, on 4 October 1832, and within a reasonable time after the said fiat was so superseded as aforesaid, he, the defendant, gave notice to the plaintiff of such supersedeas, and that the defendant was so unable to sell the said several effects as aforesaid, to wit, in the county aforesaid, whereby the defendant then and there became and was legally discharged from performing the said several promises in the declaration mentioned. Verification.

General demurrer and joinder.

Talfourd Serjt. for the plaintiff, in support of the demurrer. The promise is not made by the defend-

ant in his character of assignee, and the plaintiff is entitled to recover, having withdrawn the distress according to his agreement.

1833.
STEPHENS
v.
PELL.

The Court then called on

Addison to support the plea. The plea shows that the promises declared on were made by the defendant not to pay personally, but only in his character of assignee, out of the produce of the sale, and that when his character of assignee ceased on the superseding the fiat, he was no longer bound by them or able to perform them.

Lord Lyndhurst C. B.—The fiat was superseded, and your plea is, that as you had only a right to sell as assignee, you had no longer power to sell; but you might have sold before. It appears to me an unqualified promise, and that it was entirely in consequence of it, that the plaintiff lost his right.

BAYLEY B.—It does not appear on the face of these pleadings that the defendant has not sold the property.

Judgment for the plaintiff.

1833.

The Attorney-General against Leonard Peter Staff and Peter Brames.

M. S. by will bequeathed certain stock in the funds to trustees to stand possessed thereof on such trusts and for such purposes, and subject to such powers and declarations, as J. S. by deed, with or without cation and new appointment or by will should appoint; and in default of appointment, in trust to pay J. S. the dividends for life, and after her decease to divide the principal among her children then living. After the

THIS was an information filed by the Attorney-General against the defendants, for having, as the executors of Judith Staff deceased, paid too little probate duty in respect of the probate of the will of the said Judith Staff, and for not having obtained probate of her will, and for duties due to his majesty, and for money due to him on an account stated.

such powers and declarations, as J. S. by deed, with or without power of revocation and new appointment or by will should appoint: and of the four first counts of the information the defendants pleaded not guilty, and to the last three, that they are not indebted to his said majesty; and issue of the information the defendants pleaded not guilty, and to the last three, that they are not indebted to his said majesty; and issue of the information the defendants pleaded not guilty, and to the last three, that they are not indebted to his said majesty; and issue of the information the defendants pleaded not guilty, and to the last three, that they are not indebted to his said majesty; and issue of the information the defendants pleaded not guilty, and to the last three, that they are not indebted to his said majesty; and issue of the information the defendants pleaded not guilty, and to the last three, that they are not indebted to his said majesty; and issue of the information the defendants pleaded not guilty, and to the last three, that they are not indebted to his said majesty; and issue of the information the defendants pleaded not guilty, and to the last three, that they are not indebted to his said majesty; and issue of the pleaded not guilty, and to the last three, that they are not indebted to his said majesty; and issue of the pleaded not guilty, and to the last three, that they are not indebted to his said majesty; and issue of the pleaded not guilty and to the last three, that they are not indebted to his said majesty; and issue of the pleaded not guilty and to the last three, that they are not indebted to his said majesty; and issue of the pleaded not guilty and to the last three, that they are not indebted to his said majesty; and issue of the pleaded not guilty and to the last three, that they are not indebted to his said majesty; and issue of the pleaded not guilty and to the last three, that they are not indebted to his said majesty; and issue of the pleaded not guilty and to the last three, that t

Matthew Stainton of Isleworth, in the county of Middlesex, by his will duly made and published in writing, and bearing date the 19th March, A. D. 1821, among other things, bequeathed to W. Hodgson, W. Day, and J.A. Clarke, 4000l. three per cent. consolidated bank annuities, and thereby declared and directed that they should stand and be possessed thereof upon such

testator's death J. S. duly executed a deed according to the form prescribed by the will, by which deed, after reciting her desire to execute the power vested in her by the will of M. S., she directed the trustees to transfer the fund to herself and a new trustee, upon such trusts, for such purposes, and subject to such powers &c., as she should by any deed, with or without power of revocation and new appointment, or by her last will, direct and appoint; with certain limitations over in default of appointment, similar to those contained in the will. Under this deed the stock was transferred into her own name and that of her co-trustee. Afterwards J. S. by will made by virtue and in execution of the last-mentioned power reserved to her by that deed, and of all other powers, appointed the stock to be transferred to certain persons, in trust that it might be consolidated with and become part of her residuary personal estate, and follow the dispositions thereof thereinafter contained:—Held, that the deed executed by J. S. being an exercise of the power given her by the original will, the property became her personal estate in which she had a beneficial interest, and was as such liable to her debts, and therefore that it was liable to the payment of probate duty under 55 G. 3. c. 184. s. 38.

trusts, and for such intents and purposes, and under and subject to such powers, provisoes, and declarations as the said Judith Staff, whether covert or sole, and notwithstanding her coverture, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, and by her last will and testament in writing to be by her duly executed in the presence of or to be attested by two or more credible witnesses, should direct or appoint; and in default of such appointment, in trust to pay the dividends of the said three per cent. annuities to the said Judith Staff for life, and after her decease to pay and divide the principal equally among her children living at her decease.

The said Matthew Stainton afterwards died without altering or revoking his said will and testament, and after his death the said W. Hodgson, W. Day, and J. A. Clarke, as such trustees, became and were possessed of the sum of 38801. three per cent. consolidated bank annuities, being the said sum of 4000l. three per cent. consolidated bank annuities (less 1201. like annuities sold to pay the legacy duty thereon) upon the trusts in the said will mentioned, and thereupon by a certain indenture duly executed in the presence of and attested by two credible witnesses, and bearing date the 9th day of April in the year of our Lord 1824, and made between the said Judith Staff of the first part, the said W. Hodgson, W. Day, and J. A. Clarke of the second part, and the said Judith Staff and Leonard Peter Staff of the third part, after reciting amongst other things that the said Judith Staff was desirous of executing the said power of appointment in the said will mentioned, the said Judith Staff, by virtue and in exercise and in execution of the power and authority, powers and authorities, given, limited or reserved to her in and by the said will of

ATTORNEY-GENERAL
v.
STAFF
and Another.

Attorney-General v, Staff and Another.

the said Matthew Stainton deceased, did direct and appoint that they the said W. Hodgson, W. Day, and J. A. Clarke should, as soon as conveniently might be after the execution of the said indenture, transfer or cause to be transferred the said sum of 3880l. three per cent. consolidated bank annuities into the names of the said Judith Staff, and the said Leonard Peter Staff, their executors and administrators, upon such trusts, and to and for such intents and purposes, and under and subject to such powers, provisoes and declarations as the said Judith Staff, whether covert or sole, and notwithstanding her coverture, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, and by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, to be by her respectively executed in the presence of two or more credible witnesses, should direct and appoint, with certain limitations over in default of appointment, similar to those contained in the will of the said Matthew Stainton above set forth.

The said W. Hodgson, W. Day, and J. A. Clarke, after the making of the said indenture, and in pursuance thereof, transferred the said sum of 3880l. three per cent. consolidated bank annuities into the names of the said Judith Staff, and the said Leonard Peter Staff, and afterwards, and after the making the said indenture the said Judith Staff duly made and published her last will and testament in writing, duly executed in the presence of three credible witnesses, bearing date 20 August 1830, and thereby amongst other things, by virtue and in exercise and execution of the power and authority given or reserved to her in and by the said indenture, and of all and every other powers and authorities enabling her in that behalf, did direct and appoint that the sum of 3880l. three per

cent. consolidated bank annuities then standing in the joint names of Judith Staff and Leonard Peter Staff, should go and be transferred to the said Leonard Peter Staff, W. Sharpe, W. Hart, and J. Curter, their executors, administrators and assigns, upon the trust and to the intent that the same might be consolidated with and become part of her residuary personal estate, and follow the dispositions thereof thereinafter contained; and the said Judith Staff, by her last will and testament, did give and bequeath her residuary personal estate unto the said Leonard Peter Staff, W. Sharpe, W. Hart, and J. Carter, their executors, administrators and assigns, upon certain trusts and for certain purposes in the said will mentioned; and the said Judith Staff did also thereby make and appoint the said defendants executors of her said last will and testament; and the said Judith afterwards, and after the making of the said last will and testament, died without altering or revoking the same; and the defendants afterwards and after the death of the said Judith Staff proved her said will in the prerogative court of Canterbury, and took upon themselves the execution thereof, but did not pay any probate duty in respect of the sum of 38801. three per cent. consolidated bank amuities, so mentioned in the said last will and testament of the said Judith Staff. The question for the opinion of the court is,

opinion of the court is,

Whether probate duty is payable upon the probate of the will of the said Judith Staff in respect of the value of the said sum of 3880l. consolidated bank annuities. If the court should be of that opinion, the verdict is to be entered for the crown for 60l.; if of the contrary opinion, the verdict is to be entered for the defendants; either party to be at liberty to turn this special case into a special verdict (a).

ATTORNEY-GENERAL v. STAFF and Another.

⁽a) See Attorney-General v. Dimond, ante, Vol. I. 286. VOL. IV.

ATTORNEY-GENERAL v. STAFF and Another.

Sir George Grey for the crown. By section 87 of 55 G. 3. c. 184., the first act which contains any provision as to probate duty, it is provided, "that if any person shall take possession of and in any manner administer any part of the personal estates of any person deceased, without obtaining probate of the will, or letters of administration of the effects of the deceased," within certain periods there specified, every such person shall forfeit 1001. Next, section 88 enacts, that within three calendar months from the passing of the act no ecclesiastical court or person shall grant probate of the will or letters of administration of the estate and effects of any person deceased, without first requiring and receiving from the person applying for the probate or letters of administration, an affidavit or solemn affirmation, that the estate or effects of the deceased for or in respect of which the probate or letters of administration is or are to be granted, exclusive of what the deceased possessed or was entitled to as trustee for any other person, and not beneficially. but including leasehold estates for years of the deceased, and without deducting any thing on account of debts of the deceased, are under the value of a certain sum. Then the words " for or in respect of which the probate or letters of administration is or are to be granted," imply that when a probate is applied for, it must be applied for for all the personal property to be administered by the executors under the will. In the schedule of the act, Part III. the words are "probate of a will and letters of administration, with the will annexed, to be granted in England;" and a general clause follows in these words: "where the estate and effects for or in respect of which such probate &c. shall be granted, shall be above" a certain value, so These sections, therefore, and the schedule, taken together, show that probate duty is imposed on

the property of the deceased for or in respect of which the executor, in order to clothe himself with a legal character, to enable him to collect it, applies to the ecclesiastical court for probate; so that the question here is, whether this is such personal estate as that and Another. described in the act "for or in respect of which probate is required?" Setting aside the peculiar circumstances of the case, and treating it as an ordinary case, in which the property is disposed of by a power of appointment, the question arises whether, if a disposition takes place by the will of the deceased, it does not require probate, and if it does, whether it must not be granted for or in respect of the estate and effects in the will sought to be administered by the executor to whom it is granted. If it is made by will, or must be made by will, or there is a provision that it may be by will, the authorities show that the will must be subject to all the incidents of any other will, including probate, and that it is completely analogous to any other will made without that power, and that neither courts of law nor equity will take notice of it till probate is taken out by the executor. Sugden, in his Treatise en Powers, (5th edit. 340,) says, (speaking of wills of married women, made under powers of this kind, "where the will relates to personalty, it must be proved in the spiritual court. This has been determined even with regard to an appointment by the will of a feme covert, who cannot in the notion of the law make a will, though a different opinion seems once to have prevailed. The courts of equity, however, will not at this day read the appointment by will till it is duly proved as a proper will in the spiritual court, nor will the probate preclude the necessity of proving the instrument as an appointment upon any claim under it in a court of equity." That passage shows that a will must be proved in the ecclesiastical court before it can

1833. ATTORNEY-GENERAL STAFF

STAFF

be acted on. Again, in Ross v. Ewer (a), Lord Hardwicke says, "I am of opinion that though in the notion of law a wife cannot make a will, yet where a feme covert has a separate power over her estate and may and Another, dispose of it by will, whatever sort of writing she leaves ought first to be propounded as a will in the spiritual court; and in this case, as there is no executor appointed under this writing by the wife, that court would have granted administration to the husband with this paper or testamentary schedule annexed." Probate therefore appears necessary for property like this. It may be objected, that all that is necessary for the executor to do, is to clothe himself with the legal character of executor, and that, having done that, he may call on the trustees of the settlement for a transfer of the fund appointed by the will; but unless that position applies in all cases, it will not afford a correct rule in any. Supposing this to be a will made by a person having no other property to dispose of, and that this property were disposed of by will by virtue of a power, if the executor wishes to obtain a transfer of the fund from the party in whose name it is standing, he must go to the ecclesiastical court to propound that appointment under the power as a will, and demand probate before he can obtain a transfer of the fund. in respect of" what property is he to apply for probate? It must be some property over which he has unlimited control for or in respect of which duty is claimed . [Bayley B. By means of a power he might have control over the property in which he has no beneficial interest.] In such a case the probate duty would be returned under distinct clauses of the act. The case would be that of a common trustee. [Lord Lyndhurst C. B. The probate duty would be payable in respect of matter exclusive of what you may be

seised of as trustee. There may be nothing but what the deceased possessed as trustee, in which case, though it may be necessary to take out a probate, the executor would pay no duty.] There the executor must make affidavit that his testator had no beneficial interest. That could not be done here. But where the testator has a mere naked power, as where a property is vested in a person in trust for A. during his life, with a power to B. to dispose of it to some one else, B.'s executor could make such an affidavit. This, however, was an absolute interest in the testatux, and not a mere naked power of disposition. Palmer v. Whitmore (a) is decisive of this case. In

ATTORNEY-GENERAL

O.
STAFF
and Another,

(a) The following note was kindly furnished me by the Solicitor of legacy duties. " Vice-Chancellor's court, 14 January 1832.-The Rev. Thomas Daltes, by his will duted 19 September 1825, after reciting that under and by vistae of an indenture dated 23 May 1809, he had the absolute power of disposing of certain trust funds, did direct, limit and appoint, will and declare, that such trust funds should be applied in the payment of certain legacies by his said will given, and appointed defendant Millard his executor. Millard, on applying for probate of the said will, included the amount of the said trust funds in the affidavit made by him in pursuance of 55 G. 3. 184. s. 38. with the other personal estate of the testator, and paid probate duty on the whole amount. The accounts of the executor were afterwards taken in this suit by the master, who reported that he had detlined to allow the sum of 2971. 10s., being the propertion of the probate duty plaid in respect of the trust funds, over which the testator had the power of appointment. Defendant Millard then excepted to the master's report. After, hearing counsel in support of the exception, and of the master's report, the Vice-Chancellor said, I think in this case the duty was properly paid. The testator had an absolute and general power of appaintment, and chose to execute the power by means of a testamentary appointment; and by so exercising the power the testator has made the fends part of his personal assets. Such testamentary appointment cannot be judicially taken notice of till proved in the proper ecclesiastical court. Then what does the act require? That probate duty shall be paid on the value of the estate and effects for and in respect of which such probate is required to be granted.' I therefore think that the playment by the execube was right, and the exception must be allowed," . 1884 At ...

ATTORNEYGENERAL
v.
STAFF
and Another.

that case a will had been made by virtue of a power of this kind, and the executor had paid the probate duty on it; a practice which, till 1830, had been universal. That was a suit to take an account, followed by a decree under which the executor carried in discharges claiming to be allowed for certain payments made. The master thought that probate duty was not payable, and refused the executor the allowance of 2371. 10s. which he had paid on that But the Vice-Chancellor after argument decided that that sum was payable for probate duty under the settlement, saying, the testator had a general power, and had so exercised it as to make it a part of Then here the probate gives his personal assets. a right to receive this property; it must, therefore, be that for or in respect of which probate is granted. [Lord Lyndhurst C. B. In this case the testatrix had an absolute power of appointment by deed in her lifetime to whomsoever she pleased. made it her absolute property. She had a right to appoint by will not among classes of persons, but in any way she pleased; she does appoint by will, and has made it part of her residue.]

The Court here called on

Comyn to argue for the executors. In no case except Palmer v. Whitmore has the present question been raised, namely, whether probate duty is payable where the deceased had only a power of appointment. The 38th section of 55 G. 3. c. 184. applies only to property in which a testator was beneficially interested. The testator here bequeathed this property to trustees, giving Mrs. Staff only a life interest by way of annuity in the dividends. [Lord Lyndhurst C. B. If she had disposed of it in her lifetime by deed, absolutely as her

own property, it would not have paid duty a second time. Then is it not in the same situation as any ordinary She took it from the person who bequeathed it to her. Suppose that instead of creating a power by the deed, she had sold out the stock and and Another. lived on the interest of the purchase money, and then had afterwards disposed of it by will, it would have been equally liable to the duty. Then what hardship arises in it? The executors of Stainton's will paid duty on this property. Then to whom was it bequeathed? to trustees, subject only to Mrs. Staff's appointment. She had no possession of or interest or estate in the property. The fund from which the annuity arose was in the trustees. They had the legal power over it, and she could only appoint it during her life. Then not having so done, but having by her own will made an appointment agreeably to the testator's will, it never was her property, or was she ever possessed of it. [Lord Lyndhurst C. B. Did not she take the legal estate out of the trustees immediately after the testator's death? she exercised her power at that time by compelling a transfer from the trustees under the testator's will, to new trustees appointed by her on trusts, subject to her power of appointment.] The deed of 9th April 1824, merely transferred the property to her under the trusts contained in the original will; and to protect the property from being part of her estate, it was provided, that in case of her death it should go to the surviving trustee. That would prevent it from ever becoming her property. That deed reserves the same power of appointment as is given by the original will, and transfers the fund to the donee on the trusts therein contained. Then this property never vested in her so as to become part of her estate. [Lord Lyndhurst C. B. If a party has a power to dispose of property absolutely, it is the pro-

1833. Attorney-GENERAL Stapf



perty of the party having the power. It is different where the powers are very limited, as for example, to choose between A. and B., but here she could have given it to herself at once and spent it all. She however executes a power giving it to trustees for her benefit. She might have conveyed it for valuable consideration in her lifetime, being only fettered as to the form of conveyance, not as to the object. Bayley B. She had in substance the control over the whole beneficial interest, having an absolute right of ownership if she chose to take the proper means to convey it.] Unless she reduced it into possession it would not be assets in her hands. [Lord Lyndhurst C. B. Did she not reduce it into possession in 1824, when she exeicuted her power of appointment, taking the fund out of the hands of the persons who held under Stainton's will, and vesting it in herself and another in trust, subject to her power of appointment? They were merely placed in the situation of the trustees under the original will. The exercise of a power of appointment and revocation is only a ministerial act, in doing which the person exercising it has no interest. [Bayley B. The mere execution of a power over property in which the party has no interest, is a naked execution of a power, but surely there is an interest if it is limited to such uses as you shall appoint. Till the appointment ds made, no interest exists in the appointee in the fund or property to be appointed. Mrs. Staff exercised the power only by becoming a trustee with another person, for the express purpose of carrying into execution the trusts of the original testator. She took no more interest than the trustee had; now that was not beneficial. Under that deed she had no power of disposition, except according to the directions of the original will; and when she died the legal estate in it survived to the trustee joined with her to protect it. Unless an

interest was conveyed to her by that deed, she had mo life interest in this fund, as she made no disposition of it during her life. Had she died intestate, would the fund in question have been distributed among her next of kin by her administrator?

ATTORNEY-GENERAL TO. STAYP and Auceber.

[Lord Lyndhurst C. B. She itakes and life interest during her life, but she might have taken more had Suppose that she had thought proper, when she created these two new trustees, to make them trustees for her own absolute benefit, she might have Instead of doing that, she chooses to make them trustees according to the original power of appointment, but she was not bound to adopt those powers. She had the option of making them trustees, subject to any other power or trust she might select, as for instance, for her own absolute use and benefit. But in doing what she has done she exercised a dominion over the fund. Then is not this a probate relating to the "estate and effects" of the deceased Mrs. Staff?] She had no such beneficial interest, not having reduced the estate into possession, and her appointee would take under the original will, which raised the power of which she was the organ On her intestacy the fund in question must have passed under the deed, and could inot have been distributed by her administrator among her next of kin, or applied to pay her debts, nor could it be made the subject of a devastavit. [Lord Lyndhurst C. B. If a man has an absolute power of appointment over personal estate, is it not subject to his debts? (a)] This fund would be liable to the original testator's debts, but was purposely protected by the trust from the debts of Mrs. Staff, to whom the property was given. Her act in appointing being merely ministe-Logic bing A

⁽a) Sugden on Powers, 5th ed. 340, 346. (111 - 11)

ATTORNEY-GENERAL

7.
STAFF
and Another.

rial, the party taking under it took it from the original power, and cannot be affected in his right by the property being taken to pay the debts of the person appointing. In *Re Cholmondeley* the crown gave up the claim to probate duty. [Bayley B. The power was in that case unconnected with an interest. The principle of that case was, that nothing was given out of the personal estate of the testator.]

Sir George Grey in reply. In the matter of Mrs. Cholmondeley (a), the counsel who contended that the fund was free from legacy duty, distinguished between a mere naked power and a power coupled with such an interest as gives the party an absolute control over the property, e.g. as in this case, where property is given to trustees for such purposes as A. shall by deed or will appoint. In the latter case it is considered as vesting in A. an absolute property in the fund; and if the power of appointment is there exercised, it would be in the hands of the appointees applicable to the purposes to which the appointor's personal estate would be applicable, that is, in paying the creditors; the appointees being in such case considered in equity as trustees for the creditors to the extent of their claims. In Holmes v. Coghill (b), the Master of the Rolls says, "Upon the second point there is an evident difference between a power and an absolute right of property, not so much with regard to the party possessing the power as to the party to be affected by the execution of it. If our attention is to be entirely confined to the power, there is no reason why the money he has a right to raise should not be considered his property as much as a debt he has a right to recover." [Bayley B. Therefore if you give a man power to raise 10,000%. and he does not raise it, is it to be considered part of

⁽a) Ante, Vol. III. p. 10.

⁽b) 7 Ves. junr. 504.

his property? There is no authority going the length of saying that where no appointment is made under the power, the creditors could claim; but it appears from them that by the exercise of the power the creditor could come in, and that there being an absolute power and Another. over the fund, and an exercise of that power, the parties are instantly let in, even as against the persons in favour of whom the trust is made. In Jenney v. Andrews (a), the Vice-Chancellor says, "Where there is a general power of appointment by will, and an appointment made, the appointee is a trustee for creditors, but it is not for creditors at the time of the execution of the will, but at the death of the testator." Then the appointment lets in all the creditors who were then such, to claim on the appointed fund as they would have done on the residuary estate. By executing the deed of 1824 the power was gone for ever. The ancient uses in Stainton's will were determined (b), and by an accident, not being precisely the same with the new in all particulars, are not renewed, but take effect in part only, and under the deed of 1824.

The only remaining question is, the effect of the deed of 1824 on this fund. It is said that as Mrs. Stuff did not call on the trustees of Stainton's will to transfer the fund into her sole name, but only into the name of herself and a trustee who survived her, the legal estate then vested in him. But the circumstance of a fund being placed in the names of trustees for the use of a person beneficially interested will not exempt it from probate duty; for if it did, no duty would be payable on money which at the request of the party beneficially interested has been secured on a mortgage taken by the trustees in their own names, subject to the usual declaration of trust, that the mortgage money

1833. TTORREY-STAPP

⁽s) 6 Madd. R. 264; see ante, Vol. III. 15.

⁽b) Sugden on Powers, 5th ed. 347.

ATTORNEYGENERAL

V.

STAFF
and Another.

belongs, to other parties. If such money does not form part of the estate of the latter, and at their deaths is not subject to probate duty, the legacy duty might always be evaded by keeping the money in the names of trustees. [Bayley B. Had she made no appointment would this fund have been burdened with her debts?] There is no question here as to that; but the decisions show that where no appointment is made the persons who take in default of such appointment, would take subject to the claims of creditors; and some of them appear to show that they would have the same right even if no appointment were made. Limitations might exist to carry the fee, if the power was not executed, but this deed does not give Mrs. Staff a limited interest, e. g. for life, but the co-trustees are to hold the corpus of the property, subject to her absolute control. She might, in the formal manner required by the deed, compel her co-trustee to transfer to herself or a stranger. The having interposed the trustee in this case would not affect her right so to do any more than if done to bar dower, in which case it would not affect the descent of the fee. Besides, shethaving by her will consolidated this fund for all other purposes with her residuary personal estate, liable to the claims of her legatees and creditors. how can it be exempted from probate duty?

The Court said, that though they entertained little doubt, they wished to see the case of Palmer v. Whitmore, and their judgment was next day delivered in the following terms by

Lord LYNDHURST C. B.—We are of opinion that the estate of Judith Staff is subject to probate duty in respect of the property in question. Matthew Stainton by his will bequeathed the sum of 4000l. three per

cent. consolidated bank annuities to trustees, subject to a general power of appointment in Judith Stuff. Shortly after the death of Matthew Stainton, the tertatrix Judith Staff executed the power of appointment by appointing the property to herself and another and Another. person, subject to a new power of appointment created by herself. That second power of appointment was also a general power of appointment corresponding in substance with the former power. The second power of appointment was executed by her will. The property by the execution of the power of appointment became liable to her debts, and became her personal estate. She had an absolute control over it. was not a mere trustee, but had a beneficial interest in the property. The case, therefore, comes within the very words of the 38th section of 55 G. 3. c. 184., and clearly within the spirit and meaning of it.

1833. ATTORNEY-GENERAL STAPP

We are therefore of opinion that the probate duty attaches.

In the case of Palmer v. Whitmore the same question appears to have been decided by the Vice-Chancellor upon exceptions to the master's report, and there was no appeal from that decision. must therefore be

Judgment for the crown.

Doe against HARE.

TRESPASS for mesne profits accruing between 5 A plaintiff re-June 1830, the day of the demise, and 4 June 1832, covered in ejectment on a when the sheriff delivered possession under the eject- demise laid on ment. At the trial at the Middlesex sittings after last the action for

mesne profits,

the occupation being proved from that day, the defendant showed that a sum being due on 24 June for ground-rent, was paid by him: - Held, that he might deduct that sum from the damages recovered for the mesne profits, and that the plaintiff could only recover the costs taxed between party and party.



term, before Lord Lyndhurst, the defendant was proved to have occupied the plaintiff's premises for the period laid in the declaration, and to have paid 181. 10s. for a quarter's ground-rent due 24 June 1830, as well as other sums for two years' ground-rent accruing due during his occupation. The verdict was for the plaintiff, for the mesne profits proved, deducting the sums so paid by the defendant.

Watson for the plaintiff moved to increase the verdict, by adding the 181. 10s. deducted as paid for the first quarter's ground-rent. The defendant either came wrongfully into possession on 5 June, or being in rightful possession before under a tenancy then expiring, became a wrong-doer from that day. In the first case the defendant could not, by volunteering a payment of the ground-rent, be entitled to use it in reduction of the plaintiff's claim for occupation for a subsequent period; and in the second, the defendant would have paid it on his own account in respect of his previous use of the premises.

LOTH LYNDHURST C. B.—The defendant was obliged to pay the ground-rent demanded of him, and did not make a voluntary payment in order to charge the plaintiff with the amount.

BAYLEY B.—There is no evidence that the defendant occupied from Lady-day 1830, or before 5 June in that year. His property on the premises would be liable to distress for the ground-rent due after the latter date. The real value of the premises on the 5th June to him, as to any other occupier, must be calculated minus that sum which he was so obliged to pay for ground-rent. It was an outgoing falling due during the time of his occupation, and he could not exonerate

himself from liability to pay it. As the plaintiff, if in possession, must have paid it, he is not hurt by the defendant's having done so. As to extra costs, only such costs are recoverable as would on taxation he payable between the parties.

1833. DOE v. HARE.

Rule refused.

Guy against NEWSON.

COVENANT on an agreement under seal for the The plaintiff payment of 220l. with 5l. per cent. interest, by being about to quarterly instalments. Three instalments were sought dissolve partto be recovered from the defendant with interest due plaintiff, in Lady-day 1833. Plea, discharge of defendant under consideration of 2251.4s.6d., the insolvent debtors' act on 23 August 1832. Repli-assigned the cation, traversing that discharge.

At the trial before Gurney B. at the London sittings ship to Long, after last Trinity term, the agreement declared on wno, with J. and the dewas produced by the plaintiff, dated 19 March 1831, fendant, in between the plaintiff of the first part, G. K. Long of thereof, sevethe second part, J. A. Avon of the third part, and rally and respectively codefendant of the fourth part; whereby, after reciting venanted with that the plaintiff and Long had carried on business the plaintiff, that they or together as copartners, and had agreed to put an end some or one of to the copartnership, on the sum of 2251. 4s. 6d. being and would pay paid or secured to the plaintiff, and that the plaintiff the 2251. 46.6d. had agreed to assign the debts owing by the part- ments: Held, nership to Long, who had undertaken to pay all the that this was not a collateral debts due from the partnership to other persons: It engagement was witnessed, that in consideration of 5l. 4s. 6d. paid ant to pay if to the plaintiff by Long, and also in consideration of Long did not, but an absothe several covenants made by Long, Avon, and the lute covenant

debts owing to the partnerwho, with J. A. by instal-

events; and was determined as to instalments becoming due subsequently to his discharge by the defendant's discharge under the insolvent act, 7 G. 4. c. 57.

Guy 7.
Newson.

defendant, thereinafter contained, for the payment of 2201. and interest, and their indemnifying the plaintiff against all actions &c. in respect of the partnership, the plaintiff assigned the debts due to the partnership to Long, and in consideration of the premises, Long, Avon, and the defendant did thereby for themselves severally and respectively, and for their several and respective heirs, executors, &c. covenant and agree with the plaintiff, his executors &c., that they, Long, Avon and the defendant, or some or one of them, or of their executors, &c. should and would pay and cause to be paid to the said plaintiff, his executors and administrators, the sum of 2201. in manner following; that is to say, the sum of 10l. on Midsummer-day then next, and the like sum of 101. on each succeeding quarter day of payment of rent in the year, until the whole of the said sum of 2201. should be fully paid; and also should and would in the meantime. and until the same should be so fully paid, pay or cause to be paid to the plaintiff, his executors or administrators, interest from the day of the date of the instrument upon so much of the said sum of 2201. as should remain unpaid, at the rate of 51. per cent. &c. such interest to be payable on each of such succeeding The plea having been proved, the quarter days. plaintiff was nonsuited, with leave to move to enter a verdict for 301. the amount of the three instalments.

John Jervis moved to set aside the nonsuit. Is this a debt from which the defendant can be discharged under the insolvent debtors' act? The defendant's undertaking was intended to be contingent only, and collateral to that of Long the principal. The 51st section of 7 Geo. 4. c. 57. applies in terms to sums "payable by way of annuity or otherwise at any future time or times." "Otherwise" applies to nothing but a grant of an annuity or security of like nature,

and not to the payment of a fixed sum. That appears from the mode in which the value of the sum payable is directed to be ascertained, Winter v. Mouseley (a) Bayley B. It was there contingent whether any sum of money would be payable or not. An annuity is no debt, and is not payable at all events.] Section 47 is directed to debts and sums of money due and claimed to be due from the prisoner at the time of filing his petition, or for which persons who claim to be creditors shall have given credit to the prisoner before the time of filing his petition and not then payable. ther ease occurs here; the credit was clearly given to Long, Avon and defendant were sureties only, and no debt was due from defendant to plaintiff at the time of filing the petition. The words of the bankrupt act, 7 Geo. 1. c. 31. "debts payable at a future day," resemble those of "debts and sums of money not payable at the time of filing the petition." Then Ex parte Adney (b) decided on the former act applies. There A. before his bankruptcy, in consideration of 14. 10s. 7d. received from B., undertook in writing to make himself liable for due payment of a note on which H. was then indebted to B., B. thereupon consented to furnish H. with more goods, and A. became bankrupt before the note was due. The undertaking of A was held collateral only in case H. should not pay the note when due; so that being contingent only, it could not be proved as a debt under A.'s commission. [Bayley B. That was only a guarantie; B. undertook not that he himself should pay, but that H. should.]

Gur v. Newson.

BAYLEY B.—Suppose there had been no insolvency, and that the plaintiff had sued on this instrument, would it have been necessary to have alleged a pre-

⁽a) 2 B. & Ald. 802.

⁽b) Cowp. 460.



vious demand made on Long, and nonpayment by him? For if that averment was unnecessary, the undertaking is not collateral. If one of two joint or several obligees pay the debt, it is gone. It is not inconsistent with the defendant's intention to bind himself to pay the debt of another, that he should bind himself absolutely to pay it.

The argument in this case has raised no doubt on my mind as to the mode of disposing of it. The partners are about to separate. Long is to take the partnership debts, and the plaintiff is to be paid a sum of money at all events. He accordingly takes a security from Long, Avon and the defendant, by which the two latter severally and respectively covenant with the plaintiff, that they or some or one of them should pay the plaintiff that sum by certain instalments. That was an absolute engagement on the part of each of them that the money should be paid, and is not a mere collateral undertaking to pay if Long did not. That being so, it was a debitum in præsenti solvendum in futuro, and as such, a debt to which the defendant's discharge under the insolvent debtors' act was a bar.

VAUGHAN B.—I think this is clearly an absolute covenant to pay at all events.

The other barons concurring,

Rule refused.

FISHER and Others against BEGREZ.

1833.

ON the third day of the term, Petersdorff for the The privilege defendant, moved for a rule calling on the plain- enjoyed by tiff and the sheriff of Middlesex, to show cause why the domestic the ca. sa., on which the defendant had been arrested, ambassador, should not be set aside and the money paid by him to is the privilege not of such the sheriff, under protest, should not be returned, on servant, but of the ground that the defendant was privileged from the amoustant the defendant was privileged from the defendant was privileged from the amoustant the defendant was privileged from the defendant the defend The facts disclosed by the affidavits of the fore, where a defendant were, that he was a Belgian in the service sworn to be of the Bavarian ambassador, as first singer at his such a domeschapel, as well as singer of solos in the masses cele- and whose brated there, and that he believed himself the only duties may or may not be of singer there competent to perform solos. That he was a domestic bound to attend there on Sundays and Good Fridays, nature, 15 a rested, but and, except for a few weeks when ill, had for the last neither the fourteen years attended the chapel on those days, and nor any one on all other days when required by the ambassador or on his behalf the first priest. That he received for his services 301. liberation, the per annum, paid quarterly by the ambassador's secretary. That the ambassador was a roman catholic, and out of custody that according to the ritual of his religion it is necessary to the due celebration of divine service and mass, case of domesthat there should be a person to officiate as the deponent hath done, and still does as first chorister. the chapel was the ambassador's domestic chapel, there being no other in this country which he could conveniently attend, and that the defendant is his domestic servant for the aforesaid purposes and in respect of his situation, and is not a trader within the bankrupt laws. The Court ordered that the sheriff retain in his hands the sum levied by him in this cause until their further order.

servant of an the ambassanature, is arambassador applies for his tic service.

Follett for the plaintiff showed cause. Applications

FISHER and Others

BECREZ.

of this kind since stat. 7 Ann. c. 12. s. 5. have failed, because made to resist payment of debts on the ground of colourable acts of service. The statute is only declaratory of the common law. The defendant has no real duties to perform except singing. Now it appears by the plaintiff's affidavit, that that is the defendant's profession, and that he is also a teacher of singing and music, selling the copyrights of his own musical compositions, and making a large income by his business. It is also sworn that the salary of 30l. a year is received, not from the ambassador's secretary, but from one Jefferson, who receives the admission money at the chapel doors, out of the money so received. The Bavarian minister refused to interfere, none of his household make any affidavit, and the chapel is at a distance from his residence. The defendant did not come here with the ambassador, but being settled here, procures this situation in order to enjoy this privilege. On his arrest, he said it was inconvenient, as his benefit at the opera-house was fixed for the evening. The small consideration paid for singing so much in the chapel, when his exertions are so much more highly paid for elsewhere, shows that his situation there is used colourably, in order to secure himself from process of his creditors. In Lockwood v. De Coysgarne (a), a domestic physician to a foreign minister was refused his privilege on that ground. Besides, the defendant has asked how it could be supposed he would take the situation at so small a salary, were it not for its attendant privileges.

Platt for the sheriff. The defendant, in answer to a question by the sheriff's officer, said, that he did not know that he should make any application to the court unless he heard from him that evening. No such communication being made, the sheriff paid over to the

plaintiff the levy money. The privilege therefore, if existing at all, has been waived.

FISHER and Others v.
BEGREZ.

F. Pollock and Petersdorff for the defendant. application is not too late, for the money was not paid over till 4th November, notice of the motion having been given on 23d September. But lapse of time will not set up proceedings in themselves illegal and void. [Lord Lyndhurst C. B. Has not the defendant waived his privilege by what he said to the officer?] A party may waive his privilege, and if money is paid over by the sheriff to the creditor in consequence of that waiver, can the defendant come here and claim it again?] Loose conversation will not be strained into a waiver. In Novello v. Toogood (a), the distinction between claiming protection for the property and for the person, as in this case, was admitted by the whole court. The chapel is not the less the chapel of the ambassador, because it is made available to others. That is the case with the royal chapels in this country. gistering of the defendant's name with the sheriff is a check on other persons claiming the privilege.

LOTA LYNDHURST C. B.—I am not satisfied on these affidavits that the chapel in question belongs to the Bavarian ambassador, though lie has a seat there; I should infer the contrary, from the fact that money is received at the door, out of which the expenses, including the singing of the defendant, are paid. But this application is not made by the ambassador himself, or by his authority. No person acknowledged to be in his employ makes any affidavit, and the person who receives the money at the chapel door is silent. I feel satisfied that the service set up by the defendant is colourable only. The defendant is sworn to be a

FISHER and Others v.
BEGREZ.

public singer at the opera, as well as a teacher of music and singing, and a composer, publisher and seller of music, making a large income by those pursuits. He also said, "Do you suppose I should have accepted the place but for the protection it would afford me?"

BAYLEY B.—The privilege sought to be enforced is not the privilege of the servant, but of the ambassador. The defendant, if hired at all by the ambassador, must have known how he was hired; but that is not sworn. Though he says he may be called on at any time, he shows no actual instance of being called on by the ambassador to perform any services. All these circumstances were peculiarly within his own knowledge. Nor is the application made by or at the instance of the ambassador, or by the authority of any of his establishment.

GURNEY B.—The defendant may try the question by action on the case, if so advised.

Rule discharged with costs (a).

(a) See same case in a prior stage, ante, Vol. III. 184.

BLACKBURN against PEAT.

The construction of Reg. Gen. M. 1 W. dorsement on the writ, that the residence of the 4. No. 8. [ante, Vol. I. 160,] is, that an attorney was at Ilford in Essex (seven miles London). His name and place of abode were so ney residing

out of London, but within ten miles, must enter in the book at the office of the clerk of the pleas, some proper place, within one mile of that office, where notices &c. may be served.

Pleadings are within that rule.

entered in the master's book, at the office of the clerk of the pleas; but no entry appeared there of any "place in London, Westminster, or Southwark, or within one mile of the said office, where he might be served with notices &c." pursuant to Reg. Gen. Mich. 1 Will. 4. No. 8. [Vol. I. p. 160.] The declaration was delivered on 24th October, with a demand of plea; within the four days for pleading, viz. on the 28th, the defendant's attorney stuck up a copy of a plea of nil debet in the office, entered the plea in the plea book, and at four o'clock put a copy of the plea in the twopenny post, directed to the plaintiff's attorney at Ilford, with notice that the plea was in the office. not reach him at Ilford till the morning of the 29th, after the clerk had left that place, in order to sign judgment. Judgment was signed on the 29th for want of a plea. Defendant first knew of it by service of notice of taxation on 5th November. A rule for setting aside this judgment for irregularity with costs, on the ground that before it was signed a plea was in the office, was obtained on 6th November.

1833.
BLACKBURN
v.
PEAT.

Heaton showed cause. By the general rule cited, "every attorney admitted in this court, and residing in London or within ten miles of the same, shall forthwith enter in the book, kept for that purpose in the office of the clerk of the pleas, in alphabetical order, his name and place of abode, or some other proper place in London, Westminster, or the borough of Southwark, or within one mile of the said office, where he may be served with notices, summonses, orders and rules in causes depending in this court." The plaintiff's attorney has complied with the alternative in the rule, by giving his place of abode within ten miles of London. He had an option to have given a proper place within one mile of the office, but having complied with the

1833.
BLACEBURY

E.
PEAT.

object of the rule, riz. that he should enter in the book a known place within ten miles, where notices may be served, he was not driven to the hardship of having an office of his own in town, or to employ an agent there. This rule seems to be grounded on Reg. Gen. K. B. Hil. 8 Geo. 8. Tidd, 9 ed. 71; as to which Mr. Justice Aston says, in Lofft. 357, "There are many attornies who have no fixed certain place of residence. Therefore it was that such place where he might be served, though not his actual place of abode, was mentioned in the rule; but where the name and place of abode is entered, service at that place is the proper service." At all events, this rule does not apply to the delivery of pleadings.

Hoggins was heard in support of the rule.

Lord Lyndhurst C. B.—The distinction contended for between the service of pleadings and notices, does not exist, the inconvenience intended to be obviated by the rule cited, being precisely the same in both cases. On the other point, the rule clearly means that every attorney residing in London, Westminster, or Southwark, must enter in the master's book his place of abode, or some other proper place within one mile of the office where he may be served with notices &c., and that where he does not reside in London, but within ten miles, then he must specify some proper place within one mile of the office. It never could have been intended that notices &c. should be served at any distance round London less than ten miles.

BAYLEY B.—The object of the rule clearly was, that parties who were under obligation to serve notices, orders, summonses, &c. should not be obliged to go into the country to do so, but that the attorney to be served should name a place in *London*, or within

a mile of the office where such service might take place. He has thus an option of having notices left at his abode, or at a proper place named by him in London &c. For the latter words apply as well to the attorney's place of abode, as to the "other proper place." The master certifies that in practice, attornies resident within ten miles of London fix some coffee-house &c. within a mile of the office where notices may be left. As to costs, the attorney does not allege that he was misled by relying on a different construction of the rule cited.

1833. BLACKBURN v. PEAT.

BOLLAND B.—The rule contemplates two classes of attornies, those who live in London, Westminster, or Southwark, and those who live within ten miles of The first class may enter their names and places of abode within London &c., but the latter must enter a place within one mile of the office.

Rule absolute.

HAMBER against PURSER.

A SSUMPSIT by a messenger against the sole In an action assignee of a bankrupt, under a commission issued ger to a compursuant to 6 Geo. 4. c. 16. for money paid in adver-mission of tising a third meeting of creditors, and for hire of the against the room where it was held. At the trial before the sheriff, assignee, appursuant to 3 & 4 Will. 4. c. 42. s. 17., the plaintiff 6 Geo. 4. c. 16. put in a letter from the secretary of bankrupts in 1819, to recover the costs of recognizing the plaintiff's appointment to a then exist- advertising a

pointed under meeting of creditors, and of

hiring a room for them to assemble in, it is sufficient to prove the plaintiff's appointment, and that the expenses incurred by him were reasonable, without proving express employment or recognition of him as messenger by the assignee.

1833. Hamber v. Purser. ing list of commissioners of bankrupt. The proceedings under the commission were put in, and a taxed bill of costs, in which the charges claimed were allowed, and the fees due to the plaintiff before the choice of assignees were deducted, was proved. The defendant's solicitor admitted that the business was done. The plaintiff had a verdict for 51.

Lloyd moved to set aside that verdict, and for a new trial. In order to charge the defendant personally, the plaintiff was bound to prove a privity of contract with himself, either by the defendant requesting the plaintiff to act in that commission, or recognizing him as messenger therein. The remedy, therefore, was in the court of review.

Lord Lyndhurst C. B.—The assignee must have known that what the messenger did was necessary to be done. Then it was done at the assignee's expense, and the taxation shows that the charges are proper.

BAYLEY B.—As it is not disputed that these were necessary acts, the assignee was liable for the costs of them. He is not shown to have cautioned the messenger against incurring them.

GURNEY B.—The plaintiff was recognized as messenger by the commissioners having taxed his bill. The acts for which he seeks to recover must have been all done before the third meeting, before which it could not be ascertained whether the estate was solvent or not.

Rule refused.

1833.

CHAPPEL against HICKS.

BARSTOW had obtained a rule to set aside a where work was not duly performed default, on the ground that though the building for which the action was brought was proved to be inferior to that contracted for, the sheriff's jury had given a common count verdict for the whole sum stipulated by the contract to be paid. There was a special count on the contract, and materials, as and a common indebitatus count for work, labour and materials, as well as a special count, the materials.

Bompas Serjt. showed for cause, that the plaintiff riority of the work and materials, and the plaintiff that the alleged inferiority of the work was only the subject of a cross-action.

Lord Lyndhurst C. B.—The plaintiff may recover as the work, on the common counts for the labour he has performed, labour and but cannot recover on the special contract, unless it worth.

was executed in the manner agreed on. Suppose, on a contract to build a house of Baltic timber, or teak, it should be built of Virginian pine, the builder can have no claim to recover for more than the work and materials. It is not reasonable that a party who has not performed his contract should have the benefit of it, and that the party contracted with should be driven to his cross-action for the injury sustained by the other not having performed the work according to his agreement.

BAYLEY B.—After much contrariety of opinion, the rule was settled in Street v. Blay (a), that if work con-

(a) 2 B. & Adol. 456; see Allen v. Cameron, ante, Vol. III. 907.

Where work was not duly performed according to a special contract, and there is a common count for work, labour and materials, as well as a special count, the defendant may prove the inferiority of the work and materials, and the plaintiff will only be entitled to recover on the common count for so much as the work, labour and materials are mostly.

1833. Chappel 17. HICKS.

tracted for is not done according to contract, the party who contracted to perform it can only recover the value of the work and materials supplied.

Per Curian—Rule absolute.

FISHER against PAPANICOLAS.

The directions of Reg. Gen. Hil. 2 W. 4. No. 72. should be strictly Therefore when a cognovit or warrant of attorney is executed by a is in custody on mesne process, the attendance of an attorney who has been requested to cution by the clerk to the defendant's attorney, will not suffice, though the defendant make no objection at the time; for he is not named by nor does he attend at the defendant's request.

SSUMPSIT by the indorsee of a bill of exchange against the acceptor.

Archbold obtained a rule to show cause why the complied with. cognovit given by the defendant, while in custody under mesne process, should not be delivered up to be cancelled, no attorney named by the defendant and attending at his request having attested its execution, purdefendant who suant to Reg. Gen. Hil. 2 W. 4. No. 72. (a). The affidavits distinctly showed, that before signing the cognovit the defendant had consulted his attorney, who had read it over and advised him to give it, but being out of the way when the defendant was attest the exe- required to sign it, Barratt, a clerk in his office, asked Mason, another attorney, to attend the execution in

> (a) Vis. No warrant of attorney to confess judgment, or cognorit actionem, given by any person in custody of a sheriff or other officer, upon mesne process, shall be of any force, unless there be present some attorney on behalf of such person in custody, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney. -See ante, Vol. II. p. 347.

Semble, that the attorney for the defendant, who subscribes his name as a witness to the execution of the cognovit, should in writing thereon declare himself to be attorney for the defendant, and that he subscribes as such pursuant to the rule.

his stead, on the defendant's behalf. Mason accordingly attended, nor did the defendant object when he was told that Mason attended in lieu of his attorney, who was unavoidably absent. The defendant executed the cognovit, and Mason "subscribed his name as a witness to the due execution" of it, but refused to "declare himself to be attorney for the defendant, and to state that he subscribed as such attorney," pursuant to the terms of the rule, saying, he did not consider himself such. B., the clerk, also subscribed the cognovit. No proceedings had been taken on it.

1833.

FISHER

v.

PAPANICOLAS.

John Williams showed cause. Under the circumstances, the rule cited has been substantially complied with. It has only extended the former rules of K. B. and C.P. relating to warrants of attorney, so as to include cognovits. The former decisions, therefore, apply. Osborne v. Davis (a) is a much stronger case. There the defendant being in custody on mesne process, confessed a warrant of attorney in the presence of an attorney on his behalf, who was, however, a total stranger to him, being introduced by the plaintiff's attorney, who refused to give time to send to another part of the town for the defendant's attorney; but the court held the warrant of attorney valid. That case was cited in Walker v. Gardner (b), without being overruled; and though in the argument of the latter case it was attempted to distinguish between the words of the present rule and of that of Hil. 14 & 15 Car. 2. r. 4. no distinction, in fact, exists between them, for they are similar, except in the latter words, viz. that the attorney shall declare himself &c. Now those words are only directory, and may be complied with orally, it not being ordered that any written declaration should be made on the cognovit. In Walker v.

⁽a) 4 Taunt. 797.

⁽b) 4 B. & Adol. 371.



Gardner no attorney was present when the defendant executed the warrant of attorney, except one notknown to or sent for by the defendant, but proposed by the PAPANICOLAS. plaintiff's attorney to read over the warrant of attorney to the defendant, and attest it on his behalf; and the court held the warrant void; but the attorney was there introduced by the party to be benefitted by the execution.

> F. Pollock and Archbold contrà were stopped by the court.

> BAYLEY B.—I am of opinion that the judgment and execution on this cognovit should be set aside, on the ground of the non-compliance with the rule cited. My judgment proceeds on the plain language of the rule, and it is our duty to act on its obvious construction, without entering into discussion whether what has been done in this case is equivalent or not to the protection intended to be conferred on defendants by it. be observed, that by the terms of it not only is an attorney to be present for the defendant, but he is to be expressly named by him and attending at his request. These words are important, and have a clear and plain meaning. The only attorney attending the execution of the cognovit is Mr. Mason. Now is he expressly named by the defendant, and does he attend at his request to inform him of the nature and effect of the cognovit, before it is executed? There is no evidence in the affirmative, and it seems to me that the contrary is distinctly proved, he having attended in literal and not in substantial compliance with the rule, viz. at the request of the clerk Barratt, without having ever been named by the defendant. It has, however, been said, that according to Osborne v. Davis the words of this rule will be satisfied, if an attorney be present who is adopted by the defendant at the time of the execution,

though not previously named by him, and not attending at his request. That case is no authority here, for Reg. Gen. of C. P. Hil. 14 & 15 Car. 2. only requires the warrant of attorney to be "taken in the presence of PAPANICOLAS. an attorney for the defendant, which attorney shall then subscribe his name thereto." It does not appear from the report that the general rule was looked into at that Walker v. Gardner does not go the full length of this case, for there the attorney was brought in at the instance of the attorney for the plaintiff, and not, as here, at that of the clerk to the defendant's own attorney. But there is no sound distinction between that case and the present, as both vary from the rule. Had Mason attended at the defendant's request, made under the suggestion of Barratt, that would have sufficed. Stopping therefore at that part of the general rule cited, I am of opinion that this cognovit is of no force; and it is unnecessary to decide whether the latter part of the rule be directory or not.

1838. FISHER

VAUGHAN B .- This rule was neither literally nor substantially complied with. By it the former rules of Hil. 14 & 15 Car. 2. and Easter 4 Geo. 2., relating to warrants of attorney, were extended to cognovits; and it appears to me that in framing the present rule it was distinctly in contemplation to give the defendants the benefit of every part of it. It seems to me necessary that it should appear on the face of the instrument that the party attesting the signature is the defendant's attorney, or it might be always made a question whether at the time of subscribing he declared himself to be such attorney, and subscribed as such. The rule should be interpreted favourably to the protection of defendants.

BOLLAND B .- It has been argued that some of the terms of this rule are directory and matter of form only;

FISHER **v**.

1833.

but I think that the whole of it is entirely matter of substance, the object being, by the salutary precautions there provided, to prevent a party in custody from PAPANICOLAS. being imposed upon. Though no fraud is imputed in this case, we sit here to decide on the true construction of this rule. By it the defendant, on executing the cognovit, is to have the protection of an attorney named by himself, and attending at his request, to advise him on the terms. Now Mason states that he refused to declare himself to be the defendant's attorney, not considering himself to be so. Were it necessary to decide whether the declaration of the attorney. that he is attorney for the defendant, and subscribes as such, might be verbal only, or must be in writing, I should say that it must be in writing; because if an attorney takes on himself to act as such, it ought to be in the power of the court to ascertain that fact by a written document, without leaving the question whether he so acted to parol testimony.

> GURNEY B.—The rule should be strictly adhered to. Now in this case the contrary appears.

> > Rule absolute.

Jones against Roberts and Another, Executrixes.

Assumpsit against executrixes, for work A SSUMPSIT for work and labour done for the testator, G. Roberts, by the plaintiff, as an attorney.

and labour done for the testator. Plea, that a judgment had been obtained against the testator in his lifetime, and that the defendants had fully administered &c., except as to chattels of small value, not sufficient to satisfy the judgment. Replication, that the testator paid a large sum, to wit, 2001., in full satisfaction and discharge of the debt recovered, and of the judgment, and that the defendants deceitfully and with the intention to deceive and defraud the plaintiff of his damages, have deferred and still do defer procuring acknowledgment of satisfaction to be entered of the said debt, or to be released therefrom, and still permit the said judgment thereon to remain in full force. Rejoinder, traversing the payment of the said sum in full satisfaction and discharge of the debt recovered, and of the judgment, was held bad on demurrer; for the material fact to be traversed was the keeping on foot the judgment by fraud; whereas the payment in satisfaction was immaterial and not traversable, being mere inducement.

Pleas: 1st, the general issue; 2dly, that in the testator's lifetime a judgment was had and obtained by R. B. C., D. M., R. C., and J. L. J., against the said testator, for a debt of 2001., and that the defendants had fully administered &c., except as to goods and chattels of small value, not sufficient to satisfy the judgment. Replication to special plea: That G. Roberts, in his lifetime, paid to the said R. B. C., D. M., R. C., and J. L. J., a large sum of money, to wit, 2001, in full satisfaction and discharge of the said debt so by them recovered against him as aforesaid, and of the said judgment so as aforesaid had and obtained for the same; which said sum the said R. B. C., D. M., R. C., and J. L. J., then and there had and received from the said G. Roberts in full satisfaction and discharge of the said debt by them so as aforesaid recovered, and of the said judgment so as aforesaid had and obtained for the same; but the defendants deceitfully, and with the intention to deceive and defraud the plaintiff of the damages by him sustained by reason of the premises in the said declaration mentioned, have hitherto deferred and still do defer procuring acknowledgment of satisfaction to be entered of the said debt by the said R. B. C., D. M., R. C., and J. L. J., so as aforesaid recovered against the said G. Roberts, or to be released therefrom, and still permit the said judgment thereon to remain in full force and vigor, to the intent aforesaid.

Rejoinder as to so much of the replication as relates to the judgment, that G. Roberts did not pay to the said R. B. C., D. M., R. C., and J. L. J., the said sum of money in the said part of the said replication mentioned, or any part thereof, in full satisfaction and discharge of the said debt so by them so as aforesaid recovered against him, and of the said judgment so as aforesaid had and obtained for the same.

JONES

7.

ROBERTS
and Another.

JONES

JONES

T.

ROBERTS
and Another.

General demurrer to this part of the rejoinder, and joinder.

The following points were marked for argument in the paper books on behalf of the respective parties. For the plaintiff, that the rejoinder was bad, for not traversing the fraud in keeping on foot the judgment, instead of merely traversing the payment and satisfaction of the judgment; the fact of the defendant's having fraudulently kept on foot the judgment being the material allegation in the replication. For the defendant, that the rejoinder was sufficient, and that the traverse of the payment in discharge of the judgment is proper, and the only fact that could properly have been traversed, being the gist of the replication. replication would not be sufficient without that or some other averment to show the judgment satisfied; for without that it could not be an answer to say that the executrix fraudulently neglected to cause satisfaction to be entered on the judgment, and permitted it to remain in force. Nor would it signify what intention the defendants had for not entering satisfaction; nor would it have sufficed to have traversed the fraudulent neglect of the defendants to enter satisfaction, because, if it was satisfied, defendants could not avail themselves of it, whether satisfaction was entered or not; and if they had traversed that fact they must have admitted the judgment to have been satisfied.

Lloyd for the plaintiff, in support of the demurrer. Has the defendant, by traversing the payment in satisfaction of the debt recovered, selected and traversed the material fact? Now it was immaterial how the judgment was satisfied, if the defendants, by neglecting to traverse the fact that it was kept on foot by fraud, admit it; for then the defendants must also admit that the judgment was satisfied in some way. Thus in

JONES
v.
ROBERTS
and Another.

Serjt. Williams's notes to Hancock v. Proud (a) it is said, "These words, 'that the defendant defers procuring acknowledgment of satisfaction with the intention to defraud,' are the material part of the replication; and it seems that the payment of the money in satisfaction is only inducement, and not traversable." For this position he cites Veale v. Gatesdon (b), and Beamont's case (c). The latter case was an action of debt against an executor, in which the defendant pleaded several judgments in bar &c. Plaintiff replied that the judgments were satisfied and kept on foot by covin to deceive the plaintiff. Defendant traversed the satisfaction of the judgments. Demurrer by plaintiff, because the satisfaction was only an inducement to the fraud and covin; but inducement can never be traversed, and judgment was accordingly given for the plaintiff. Now here the rejoinder is, that the defendant's testator did not pay to the judgment creditors the said sum of money, or any part thereof, in full satisfaction and discharge of the debt by them recovered against him, and of the judgment obtained for the Then it is not even denied in the rejoinder that the judgment was not satisfied in some manner, e.g. by delivery of goods &c. The defendants therefore admit that it was satisfied, as well as that it was kept on foot by fraud. They should have traversed the latter point. which was the material fact to put in issue. Nor would that have concluded them from traversing the other fact of satisfaction, or any other fact, only tending with others to that issue (d).

J. Jervis appeared in support of the rejoinder.

⁽a) 1 Saund. 334, n. (9). (b) Sir W. Jones, 92, 5th Resolution.

⁽c) Latch, 111. (d) See Bardons v. Selby, Vol. III. 430, S. C.



BAYLEY B.—Suppose that the testator had paid any sum short of the 2001, that would not be a satisfaction of the judgment (a). On principle, as well as the case cited from Latch, this rejoinder is bad.

The Court gave leave to amend, on payment of costs.

(a) See Thomas v. Heathorn, 2 B. & Ct. 477; Fitch v. Sutton, 5 East, 230.

G. R. SMITH against SMITH and Others.

G. R. S. having advanced money to M. received from him, by way of security, an assignment of his equitable life interest in certain stock, standing in the names of three trustees under a marriage settlement, and in a mortgage verted in the same trustees. The solvency of M. becoming doubted, tees and a relation of to him on the

THIS cause had come to a hearing on the equity side of the court. The facts were, that in 1829 Maberly was considerably in debt to G. R. Smith for money lent in and previously to that year. By deed of 2d June, in that year, Maberly assigned to G.R. Smith, as security for the advances, his life interest under his marriage settlement in certain stock, standing in the names of the defendants who were trustees of the settlement, and a sum charged on a landed estate, also vested in them. In the same month John Smith, a relation of G. R. Smith, and one of the trustees, but not the acting one, having heard that Maberly was embarrassed, talked with G. R. Smith on the subject. who in the course of that conversation said, that he one of the trus- had advanced money to Muberly, who had given him the above-named security. This conversation took G. R. S. spoke place without any intention to give effect, validity or

subject, when G. R. S. in the course of the conversation, and without any view of giving validity to the security he held, told him that he held the above-mentioned assignment as a security for his advances. M. having afterwards become bankrupt, Held, that this statement, though made to a person who was not the acting trustee, sufficed to prevent the stock and mortgage from being in the order and disposition of M. at

the time of his bankruptcy, and consequently from passing to his assignees.

Only one counsel on each side will be heard on a case reserved for the opinion

of this court, by the judge sitting alone on the equity side.

confirmation to the previous assignment. Conversations on the subject of that security afterwards took place between the same parties as Maberly's embarrassment increased. He became bankrupt, and in April 1832 the defendants, as trustees of the settlement, having received the dividend on the stock, refused to pay it over to the plaintiff, alleging as a reason, that at the time Maberly became bankrupt his life interest was in his possession, order or disposition, within 6 Geo. 4. c. 16. s. 72., that his assignees were entitled to it, and consequently to the dividend. being made one of several questions on a bill filed, the lord chief baron ordered it to be argued in this court. The Court said, that in a case like the present, which was in the nature of a special case, and came before the court on admissions, only one counsel on a side should in future be heard.

SMITH
v.
SMITH
and Others.

Wigram and G. Richards, for the plaintiff, argued at great length, first, that the stock assigned was not in the possession, order or disposition of the bankrupt, within 6 Geo. 4. c. 16. s. 72., at the time the commission issued against him; and cited on this point the following cases: Ryall v. Rowles (a), Ex parte Monro, in re Fraser (b), Ex parte Richardson (c), Ex parte Day (d), Lempriere v. Pasley (e), Greening v. Clark (f), Ex parte Shright, in re Eyles (g), Jones v. Gibbon (h), Wildman v. Wildman (i), Ridout v. Lewis (k). They contended, secondly, that if notice to the plaintiff of the assignment in question was neces-

⁽a) 1 Atk. 165; 1 Ves. sen. 348. (b) Buck's Bankruptcy Cases, 300.

⁽e) Ibid. 480. (d) Ibid. 365. (e) 2 T. R. 485.

⁽f) 4 B. & Cr. 316. (g) 1 Mont. R. 502.

⁽h) 9 Ves. 407. (i) Ibid. 176.

⁽k) 1 Atk. 269, 2 id. 104; 1 Ves. 267, 2 id. 7, 190.

SMITH
v.
SMITH
and Others.

sary to its validity, as against the assignees of the bankrupt, it had in fact been given.

Simpkinson and Spence contrà for the defendants (a), cited on the first point Ex parte Burton (b), Ex parte Usborne(c), Dearle v. Hall(d), Loveridge v. Cooper (e), Wright v. Lord Dorchester (f), Ex parte Wills (g), Hartley v. Smith (h), Com. Dig. tit. Biens; and on the second Hawkins v. Day (i), Edwards v. Harben (k).

The judgment of the court turned entirely on the second point, and fully canvassed it; any further notice of the arguments therefore seems unnecessary.

Cur. adv. vult.

The judgment of the court was afterwards delivered by

Lord Lyndhurst C. B.—The question in this case was, whether the life interest of Mr. Maberly in the dividends of certain stock, and in the interest on a certain mortgage, which had been vested in trustees under his marriage settlement, was the property of the plaintiff under the assignment of such interest made to him by Mr. Maberly, or whether it passed to the assignees under the flat issued on Mr. Maberly's bankruptcy. The assignment to the plaintiff was made bonâ fide and for a valuable consideration, viz. to secure the repayment of a sum of money which had been lent by the plaintiff to the bankrupt.

⁽a) Virtually for the assignees. (b) 1 Glyn & Jameson, 207.

⁽c) Ibid. 358. (d) 3 Russ. R. 1. (e) Id. (f) Cited 3 Russ. R. 49. (g) 2 Cox's cases, 233.

⁽h) Buck's Cases, 316. (i) Ambler, 160; 3 Meriv. 555 n.

⁽k) 2 T. R. 387.

It was contended, on the part of the assignees, that no sufficient notice of the assignment had been given to the trustees, that the property therefore remained in the order and disposition of the bankrupt at the time of the bankruptcy, and that consequently it passed to his assignees.

SMITH v.
SMITH and Others.

On the other side, it was insisted that sufficient notice had been given, and further, that the interest of Mr. Maberly in these dividends did not come within that provision of the bankrupt act upon which the assignees relied.

It was proved on the part of the plaintiff, and not disputed by the assignees, that notice of the assignment had been given to Mr. J. Smith, one of the trustees. It was said, however, that this was insufficient, first, because it was not given for the purpose of completing and giving validity to the assignment, but merely to satisfy Mr. J. Smith the trustee, that the plaintiff, to whom he was nearly related, was sufficiently secured for his advances made to the bankrupt. But we think the purpose for which the notice was given, if a notice were in fact given, is altogether immaterial.

If Mr. J. Smith, the trustee, was made acquainted by the plaintiff with the fact of the assignment, there could be no necessity for giving him a second notice. It would have been a mere form, and altogether superfluous.

It was then urged against the sufficiency of the notice, that notice to one only of the trustees was insufficient, that it should have been given to each of them, and that this not having been done the property remained in the order and disposition of the bankrupt up to the time of his bankruptcy; but we are of opinion that notice to one of the trustees was sufficient. No valid assignment could have been made by the bankrupt after the notice to Mr. J. Smith. A second

SMITH
v.
SMITH
and Others.

assignee, in order to have obtained a priority over the plaintiff, must have shown that he had exercised proper caution in taking the assignment, and that he had applied to the trustees to know if any previous assignment had been made; and unless he applied for this purpose to each of the trustees, he would not have exercised due caution, or have done all that he ought to have done. But if he applied to each of the trustees he would have been informed by one of them, Mr. J. Smith, of the previous assignment to the plaintiff, and he must then have taken the property, if at all, subject to the claim of the plaintiff.

Then as no effectual assignment of the interest conveyed to the plaintiff could have been made by the bankrupt in this case, we are of opinion that the property was not in his order or disposition at the time of the bankruptcy, and that it did not pass to his assignees.

The view we have taken of this case, and the opinion we have formed upon the subject of the notice, renders it unnecessary to consider the other question, viz. whether the plaintiff's interest in this property be within the meaning of the section in the bankrupt act, upon which the argument on behalf of the defendants has been rested.

Judgment for the plaintiff.

ARDEN against Mornington.

The venue having been changed from London to Hereford in an action of covenant on a lease for non-payment of

R. V. RICHARDS moved to bring back the venue to London from Hereford, to which place it had been changed. The declaration consisted of one count on a covenant in a lease to pay rent for premises in Hereford.

rent for premises situate in Hereford, the court refused to bring it back.

BAYLEY B.—Does the principle of the rule for retaining the venue in actions on specialties apply, except where they are for payment of money? Suppose an action like the present to be brought by the assignee MORNINGTON. of the reversion against the assignee of the lease, the venue would necessarily be local.

1833. Arden 17.

Richards took nothing by his motion (a).

(a) See Tidd, 9 ed. 603, &c.

Johnson against Beresford.

TOMLINSON showed cause against a rule obtained An affidavit of by Richards, to change the venue from Middlesex a good defence to Staffordshire, in an action against a surety for money is not neceslent to a third person. The defendant's affidavit, on sary in order to changing which the venue had been changed, stated, that the the venue on principal debtor had assigned effects to the plaintiff, special grounds, where for payment of the sum for which the surety was sued, the facts with interest, which had been sold by the plaintiff, by amount to a the produce of which, as well as by a payment by the good defence; surety, the whole principal sum due had been satisfied, sworn that the with the interest. That six witnesses, all living in debt has been satisfied. Staffordshire, would be necessary to prove this defence. But the defendant has only sworn to a good defence, not to a good defence on the merits (b).

on the merits e.g. where it is

BAYLEY B.—The affidavit states, that the whole money which can be claimed by the plaintiff has been paid by the defendant. That would be a good defence to the action, and in substance amounts to the affidavit that the defendant has a good defence upon the merits, which is necessary by the rule on this subject (c).

Rule absolute.

⁽b) See Westerdale v. Kemp, ante, Vol. I. 261; Johnson v. Popplewell, Vol. IL 715.

⁽c) See Lancaster v. South, Vol. II. 789.

1833.

ELLIS, Assignee of the Sheriff of York, against BATES and others.

Where a bailbond was forfeited for want in due time, and an assignment of it was written for from town before bail was finally allowed, the court set aside the proceedings on the bail-bond with costs to be paid by the plaintiff, minus those of the assignment which had been occasioned by the defendant's default.

CROMPTON had obtained a rule to set aside all proceedings on a bail-bond by the assignee of the of justification sheriff of Yorkshire, with costs. It appeared, that on 28th October last, the day for which the original defendant had given notice of justifying country bail at chambers, they were opposed, on the ground that they did not swear to being "worth" the requisite sum, but only that they were "possessed" of it (a). Time was obtained till 30 October in order to procure fresh affidavits, but as they did not arrive that day, fresh notice of justification for 1st November was then given. 31st October the affidavits arrived, and the bail justified on the 1st November. A rule for allowance being then drawn up, was served on the plaintiff's attorney between three and four p.m. on the last-mentioned day; but he had written by the post of 30th October, directing his agent in Yorkshire to take an assignment of the bail-bond, which was accordingly done on 1st November, and on 4th November process was sued out against the bail on their bond.

> J. Jervis showed cause, that at all events the plaintiff was entitled to the costs of the assignment of the bail-bond, which had not been offered to him, according to Leaver v. Spraggon (b).

> BAYLEY B.—The assignment of a bail-bond without more is not a step in the cause; Woosnam v. Pryce (c). It is a step over which the court has no jurisdiction;

⁽a) See Rogers v. Jones, Vol. III. 256.

⁽b) 2 N. R. 85. See 11 Pri. 633. 2 M. & S. 526.

⁽c) Ante, Vol. III. 375.

1833.

A judge's order granted in vacation must not be drawn up as of the preceding term.

REX against PRICE and WAKELING, in LAWRENCE against MORGAN.

 $oldsymbol{A}$ Judge having granted an order calling on attornies to deliver a particular of sums paid them by their client, Heaton contended that the order, though granted in the vacation after Trinity term, had been properly made a rule of court as of Trinity The case having stood over,

BAYLEY B. afterwards said, all the judges were of opinion that to make the order thus granted a rule of court of the preceding term, would be to introduce an incongruity on the face of the proceedings, by making it appear that the attachment was issued on an order made long previous to its actual date: and that if such a practice had prevailed, it should exist no longer. The case was quite different from ruling a sheriff to return a writ which has been issued in the vacation, and on which an attachment may be obtained on the first day of next term. The order may be made a rule of court of this term.

REX against the Sheriff of MIDDLESEX, in WOLLASTON v. WRIGHT.

Where a defendant is arrested in the vacation between 10th August and 24th October, and the sheriff, to return the writ, returns defendant may put in special

A N arrest had taken place on 13th August under a bailable capias. Bail below was put in on the 15th. On the 19th the sheriff was ruled to return the writ, and on the 22d returned cepi corpus. On the 22d special bail were put in. On the 24th exception was enon being ruled tered to them, and notice thereof given to the defendant, requiring him to justify before a judge in four days at cepi corpus, the chambers, pursuant to Reg. Gen. Hil. 2 Will. 4. No. 17.

bail in that vacation, by 2 Will. 4. c. 39. s. 11, though, before they are perfected, a judge's order be made, pursuant to Reg. Gen. Hil. 3 Will. 4. calling on the sheriff to bring in the body within four days, by putting in and perfecting special bail.



pain of attachment for disobedience on making the order a rule of court in the next term, whether bail be perfected or not in the meantime. A rule having been granted,

Archbold showed cause in support of the attachment. Formerly the sheriff, when ruled to bring in the body by a rule expiring in vacation, had until the first day of the next term to put in and perfect special bail; but now, by 11 Geo. 4. and 1 Will. 4. c. 70. s. 12., bail may be justified before a judge in chambers in vacation. If the plaintiff was not precluded from obtaining a judge's order calling on the sheriff to bring in the body on a day between 12th August and 24th October, pursuant to Reg. Gen. Hil. 3 Will. 4., the attachment was regular. [Bolland B. The interval between 12th August and 24th October, is taken out of the legal year altogether.] It is contended not as to proceedings before declaration (a); for the capies required special bail to be put in within the usual time, though exceeding eight days after service or execution thereof on him. All the proceedings against the sheriff are left as before the act.

The siger in support of the rule. The 2 Will. 4. c. 39. s. 11. empowers a defendant arrested or served with mesne process between 12th August and 24th October to put in bail at the expiration of eight days from the service or execution thereof, but does not compel him to perfect it before 24th October; and the Reg. Gen. Hil. 3 Will. 4. must be taken virtually to except the days taken out of the legal year by the previous enactment in the section cited. Then the defendant was rendered in time, viz., before attachment.

Lord Lyndhurst C. B.—The act for uniformity of

⁽a) The provision in s. 11 is, "Provided also, that no declaration or pleading after declaration shall be filed or delivered between 10th August and 24th October."

process, 2 Will. 4. c. 39., recites in s. 11., that as according to the then present practice no proceedings could in certain cases be effectually had on writs returnable within four days of the end of any term until the beginning of the next, unnecessary delay was sometimes occasioned thereby; and it then proceeds to enact for remedy thereof, that if any writ of summons, capias, or detainer, issued by authority of that act, shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may be had thereon, (except as thereinafter provided,) without delay, at the expiration of eight days from the service or execution of the process, whether the last of the eight days fall in term or vacation. The clause subjoined by way of proviso, enabling bail to be put in by the defendant on bailable process served or executed between 10th August and 24th October, was thus rendered necessary to prevent a defendant who could find special bail from remaining in confinement all the vacation; but though such an enabling clause was so rendered necessary, it cannot be extended by construction beyond its terms. However, leaving the proviso out of the question, and supposing a party to be in custody in the vacation, there is, in my opinion, nothing to prevent him from putting in special bail (a).

BAYLEY B.—The fair meaning of sect. 11 is, that a plaintiff may proceed to judgment and execution at all times of the year, in vacation as well as term, with a proviso that between 10th August and 24th October, a defendant may put in bail, but no declaration or other pleading shall be filed or delivered. The sheriff was placed in difficulty by the new act, therefore the rule for setting aside the attachment must be absolute on payment of costs.

Rule absolute on those terms.

The King
v.
Sheriff of
MIDDLESEX.

⁽a) Semble, he might afterwards justify them in vacation, 11 Geo. 4. and 1 Will. 4. c. 70. s. 12.

1833.

WATSON against ABBOTT.

A sheriff or other judge presiding at the trial of an issue under a writ of trial, pursuant to 3 & 4 Will. 4. c. 42. s. 17., has the same power to non-suit that a judge at nisi prius has.

An action for unliquidated damages, e. g. in running down the defendant's boat, cannot be tried before the sheriff under a writ of trial.

HILL moved to set aside a nonsuit by the secondary of London. The question was, whether under 3 & 4 Will. 4. c. 42. s. 17., a sheriff or judge of a court of record for recovery of debts, commanded by writ of trial to preside at the trial of an issue, might nonsuit in the same manner as a judge of a superior court may do at nisi prius?

Lord Lyndhurst C. B.—A nonsuit always proceeds on the assent of the plaintiff. If the plaintiff appears to resist it he need not be nonsuited, and may insist on having the verdict of the jury. But if, on the sheriff's expressing an opinion that he ought to be nonsuited, he does not so insist or appear, the sheriff may proceed as a judge at nisi prius would do.

The Court having refused the rule on the above ground, granted it on another; against which, Petersdorff showed cause; but the rule was made absolute, when it appeared that the action was for unliquidated damages in running down the plaintiff's boat, and not for a "debt or demand," within 3 & 4 Will. 4. c. 42. s. 17. The plaintiff afterwards obtained a verdict at the London sittings.

HAYNES against Foster.

1833.

At the trial at the Guildhall sittings after Trinity
At the trial at the Guildhall sittings after Trinity
term 1832, before Gurney B., the plaintiff had a verdict,
after a trial of great length and much contradictory
testimony.

Where a bill-broker receives
a bill from his
customer
merely to get
it discounted,
he has no right

Wilde Serjt., having obtained a rule for a new trial in customers and Michaelmas term,

John Williams and Crompton showed cause, and secure a loan of money to supported the rule in Easter and Hilary terms 1833. Less has he a supported the decision turned, it has been considered unpose to the posit bills received merely necessary to state the arguments.

The judgment of the court was now delivered by Lord LYNDHURST C. B.—Messrs. Wood and Poole viously due carried on the business of bill-brokers in the city of from him; and London. The bills in question were placed in their receiving the hands by the plaintiff in order that they might in their with reasoncharacter of bill-brokers procure them to be discounted. able ground of Messrs. Wood and Poole had had extensive transac- suspicion, à fortieri with tions in business with the defendants. They owed the knowledge of defendants a balance of some amount, and in the early authority on part of the week in which the bills in question were which he held them, cannot delivered to the defendants, Messrs. Wood and Poole detain them had applied to them for assistance, and Messrs. Foster against the had lent them a considerable sum of money upon originally deun undertaking that bills should be deposited in with him. their hands to secure them for their advances. Some bills were on that occasion produced by Wood and Poole, but the defendants excepted to them, and it was arranged that in the course of the week further bills to the satisfaction of Messrs. Foster should be deli-VOL. IV.

a bill from his merely to get he has no right to mix it with bills of other pledge the whole in a mass in order to posit bills refor the purpose of discount, as a security or part security for money prethe pawnee the limited

1833.

HAYNES

V.

FOSTER.

vered. Application was made to Wood and Poole by one of the partners on the Saturday, requiring them to fulfil their undertaking, and in the course of that day Wood delivered to the defendants bills to the amount of 6000l. and upwards, including the bills in question, and the defendants advanced them a further sum of 3000l. The bills on the Monday were re-delivered to Messrs. Wood and Poole, in order that they might take the particulars of them, and they remained in their possession during that day. They were returned in the evening to the defendants, and within a day or two afterwards Messrs. Wood and Poole stopped payment.

The question is, whether, under these circumstances, Messrs. Foster can retain the bills against the plaintiff; and the first point to be considered is, what was the duty of the bill-brokers in this case?

We are of opinion that, according to the general law, a bill-broker who receives a bill merely for the purpose of procuring it to be discounted for his customer, has no right to mix it with bills of his other customers, and to pledge the whole mass as a security for an advance of money; for the consequence of this would in many cases be, that the bill of one customer might be detained for a loss arising from the dishonoured bills of other customers. Still less has the billbroker, as we think, a right to deposit bills, which are received merely for the purpose of discount, as a security or part security for money previously due from We are of opinion therefore, in this case, that Wood and Poole acted inconsistently with their duty to the plaintiff by depositing the bills in question with a large amount of other bills belonging to other persons, for an advance of money, and as a security in part for previous advances.

The next question is, whether this affects the claim of the defendants, Messrs. Foster. In general a person

HAYNES v.
FOSTER.

then made. We agree with the jury that due caution was not exercised in this transaction. We think that Messrs. Foster took the bills at their peril, and that they cannot hold them against the plaintiff. The verdict, therefore, must stand for the plaintiff.

Rule discharged.

PRICE against HUXLEY,

If a capias does not state the residence of the defendant, pursuant to 2 Will. 4. c. 39. sched. No. 4., it will be set aside for irregularity, with all subsequent proceedings, notwithstanding Reg. Gen. Mich. 3 Will. 4. No. 10, (which see Vol. III .p. 4.)

THE writ of capias not having stated the residence of the defendant, pursuant to stat. 2 Will. 4. c. 39. Sched. No. 4., a rule was obtained to set aside the capias and subsequent proceedings for that cause.

Knowles showed cause. The object of the act was to protect the sheriff in the execution of the process, and not to benefit the defendant. The court have a discretion whether to set aside the writ or not; for by Reg. Gen. Mich. 3 Will. 4. No. 10., "if the plaintiff or his attorney shall omit to insert in or indorse on any writ, or copy thereof, any of the matters required by the act 2 Will. 4. c. 39. to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not on that account be held void, but may be set aside as irregular on application to the court."

Lord Lyndhurst C. B.—The object of the statement of the defendant's residence in the form of capias provided by the act, was to identify the defendant, so that the right person might be taken. The act has provided certain forms, the adhering to which is of great consequence in order to prevent loose practice.

SERLE v.
Bradshaw.

nor is a devastavit suggested, but the claim is made against the assets of the intestate. The defendant says the administrator cannot plead in bar of that action that he has become bankrupt, but the commission is only against the goods which the bankrupt has of his own, and cannot bar the plaintiff from proceeding against the assets which the defendant has as executor.] The debt due from the intestate to the plaintiff could not be proved by him under the commission against the administrator, so that the plea of bankruptcy is not an answer or an issuable plea, viz., a plea upon which the plaintiff may safely take issue and go to trial. The defendant's object in pleading it was to obtain time, by inducing the plaintiff to demur.

Archbold in support of the rule. The certificate was a bar to this action, for the debt sued for might be proved under the commission against the bankrupt administrator. [Bayley B. What right has the plaintiff to prove against the goods belonging to the administrator in his own right? It is against them only that the commission is directed, not against those of the intestate. Then how can the certificate bar the plaintiff from pursuing the assets which the bankrupt has as administrator?] Re M'Williams (a) is an authority that where an administrator admits assets. the debt may be proved under the commission against him. The modern practice is, after petitioning for an account of assets, to follow them into the court of review, and prove against the bankrupt's estate. Cuming v. Sharland (b) shows that the ordinary plea of the defendant's bankruptcy is an issuable plea, if pleaded to the whole declaration. [Bayley B. Unless the defendant in that case was an executor or adminis-

1833. SERLE BRADSHAW.

the judgment, but there being no affidavit of merits in that respect, this rule must be discharged.

Bolland B.—One of these pleas must be untrue in order to make the other available.

Rule discharged.

PAULL against PAULL.

for non-performance of an award was resisted, on the ground that an action was pending therepeared that the party was in contempt before it was brought, by having before then refused to pay the sum awarded. The court granted the attachment on the terms of the plaintiff's discontinuing the action and paying the costs.

In showing cause against a rule for such no objection can be taken to the award, which does

for non-performance of an award in favour of the plaintiff.

Smirke showed for cause, first, that after the money

FOLLETT had obtained a rule for an attachment

on; but it ap- due on the award had been demanded, "a writ of summons at suit of the plaintiff, in an action of debt on the same award," had been sued out and served on the defendant, to which he had caused an appearance to be entered, which action was still pending. the submission to arbitration was by parol only: that the arbitrator had not given the deponent's attorney notice of one of the meetings. The court having intimated that the first was the only objection on which they had any doubt, and that the award could now only be objected to for some defect on the face of it; he contended, in support of his first point, that the party in whose favour the award was made had elected his remedy on the award by commencing an action on an attachment it; that the motion for the attachment was before discontinuance of that suit, and was at most an application

not appear on the face of it. If the reference is of a cause and all matters in difference, the attachment will issue, although the award mis-reciting it be a reference of the cause only; for if any other matter in difference existed, of which the arbitrator had had notice, it would

be a ground to move to set aside the award.

1833. PAULL υ. PAULL.

if he does not pursue both at once? In an anonymous case in Andrews's Reports, p. 299, a rule for an attachment was granted on the plaintiff's undertaking to discontinue.

Lord Lyndhurst C. B.—That case was cited and disregarded in Badley v. Loveday. The best course will be to make the rule absolute on terms, for if it was discharged, the plaintiff would only discontinue his action and apply again for an attachment, which must then be granted. That method would only occasion fresh expense. The rule therefore must be absolute, on the terms of discontinuing the action and paying the costs of it.

> Rule absolute accordingly on those terms, the attachment to lie in the office for a fortnight (a).

(a) In Higgins v. Willes, 3 M. & R. 382, Bayley B. said, that in order to repel an application for an attachment on this ground, it lies on the party resisting it to show that the action was pending when the award was made.

DADD against CREASE.

In a declaration for slander there were ten counts; the verdict on the damages, and

ASE for slander. There were ten counts in the declaration. The plaintiff had a verdict on the seventh count for 50l. and for 100l. on the other nine. plaintiff had a Costs were taxed to the plaintiff on every count, but seventh for 501. the Exchequer chamber afterwards held, on error

on the other nine for 100l. Entire costs were taxed to him on the whole. of error afterwards held the sixth count bad, and that a venire de novo should be awarded as to the nine counts. The plaintiff, however, having consented to remit his damages on the nine counts instead of a venire de novo, that court directed the verdict to stand on the seventh count on those terms: Held, that the master ought to disallow the plaintiff the costs taxed to him on the other nine counts.

DADD v. CREASE.

on the nine counts, but he had still the right to a venire de novo, which he did not claim, but consented to remit his damages on those counts. The costs being parcel of or appendant to those damages, the plaintiff, when he ceased to have a right to the damages, being the principal matter, lost the right to the accessary also. Entire costs were here taxed on all the counts, without separate taxation on each. the damages being the foundation on which the right to the costs stands, and the right to them being superseded in toto as to the nine counts, the right to the costs on them is also superseded, so that the master ought to see what portion of the costs allowed is applicable to those counts. The terms of the bargain imply that the plaintiff shall give up the damages, and consequently every thing which is by law added to or becomes part of them.

VAUGHAN B.—The plaintiff, by agreeing to remit the damages on the nine counts, agreed to remit the costs applicable to them.

Bolland B.—In Bird v. Appleton (a), a venire de novo was awarded in consequence of a defective special verdict on the first trial. The plaintiff had a verdict on the second trial, but distinct damages not being found on each count a new trial was directed, without providing, in the rule for that purpose, for the costs of the former trials; the plaintiff again had a verdict, but was held entitled to the costs of the last trial only. In Edwards v. Brown and Others (b), that doctrine was adhered to.

Rule absolute.

(a) 1 East, 111.

(b) 1 Tyr. R. 281.

1833.

REX against CALVERT, in a Cause of SMITH against CALVERT.

A RULE was granted to show cause why an attach- Where, in the ment for non-payment of costs, pursuant to the copy of an attachment for master's allocatur, should not be set aside, because in non-payment the copy of the rule served on the defendant his name suant to the was spelt Calver, not Calvert, and the master's Day, master's allocatur, which not Dax.

Miller showed cause. In — v. Rennoll (a), the final t of his court would not discharge a defendant for a variance omitted, and in an s between the affidavit of debt and the writ. that of the Bauley B. The court did not say there was no stated to be variance.] The same was held in a similar case, where Day instead the final syllable was spelt rum instead of run (b). Shaw v. Tytherleigh (c), the defendant being served the attachment and diswith mesne process in the name of John Tither Leigh, charged the gave notice to the plaintiff that if he proceeded in the defendant, though in the action, he would move to set aside the proceedings for original rule the misnomer, and tendered him the full amount on were spelt his demand. The defendant was afterwards attached. right. he not having appeared, and the court refused to set aside the proceedings as irregular. Here too the original rule, which was correct, was shown the defendant, who also swears that Day should have been Dax.

Lord LYNDHURST C. B.—The plaintiff was bound to serve a correct copy of the process on the defendant. Now the copy actually served was imperfect in two respects. It appears exactly the same as if the allocatur had not been signed at all, for it purports to be signed by one Day, not being an officer of the court

of costs, purwas served on the defendant Calvert, the master was of Dur, the In court set aside the names

⁽a) 1 Chit. R. 659.

⁽b) Ibid. 660 n.

⁽c) 2 Pri. 328.

1833. The King 27. CALVERT. or concerned in the allowance of costs. To allow this copy to be good service would be a premium to negligence.

BAYLEY B.—In Shaw v. Tytherleigh the only defect was the separation of the surname, and the objection might have been taken by pleading in abatement, in that as well as in the other cases cited. Here there is no other way to remedy these defects; besides, the attachment is for disobeying the master's allocatur. Now the copy served on the defendant does not purport to be such allocatur.

GURNEY B .- The court ought not be called on to supply the omissions occasioned by the carelessness of the attorney in preparing the copy he was to serve.

Rule absolute to set aside the attachment.

Johnson and Another, Assignees of Cochrane, a Bankrupt, against MARRIOTT.

Where an attorney who, having been employed for the plaintiffs gone on as far as the issue and giving

H. WATSON had obtained a rule for setting aside a baron's order for changing the defendant's attorney, and for restraining Mr. Jay from in a cause, had acting as such. From affidavits of the present attorney for the plaintiff and his clerk, it appeared that in

notice of trial, and had laid the facts of the case before counsel for his opinion, was afterwards discharged by his then clients, but not for misconduct; the court refused to restrain him from acting for the defendant in the cause, there being no affidavit by the plaintiffs or their solicitor that the attorney had, while in their employment, obtained a confidential knowledge of particular facts, which it would be prejudicial to their case to communicate to the defendant, or that the case which had been laid by him before counsel contained facts, the disclosure of which by him to the defendant would have a similar effect.

May 1832, Jay had been appointed attorney to the plaintiffs as assignees of Cochrane, and as their attorney had commenced this action in their names, to recover goods of the bankrupt which had been taken in execution. His bill of costs showed that he had delivered the issue, made two copies of the pleadings for briefs, had conferences with the bankrupt, given notice of trial and taken the opinion of counsel on all the facts of the case. Afterwards and before the trial he was discharged by the plaintiffs, who now swore to their belief that he was fully acquainted with all the circumstances of their case, and that the defendant's employing him would injure the plaintiffs.

JOHNSON and Another v.
MARRIOTT.

Bompas Serjt. showed cause on affidavits of Mr. Jay, that the case submitted to counsel on behalf of the plaintiffs had been drawn by their former solicitor who had handed it to him, and that he knew no more of the facts than from reading the declaration. sion with the defendant or soliciting to be appointed his attorney, was also denied. This case entirely differs from that of Cholmondeley v. Clinton (a), where it was held, that an attorney cannot of his own accord, and without more, abandon his original client and act for the other side, so as to communicate what was confided to him in his former capacity. The arguments there used for restraining Mr. Montriou from acting for Lord Cholmondeley, all rested on that ground; and Lord Chancellor Eldon expressly said, that he could not be considered to be in the situation of a solicitor discharged by Lord Clinton, and therefore that he could not be employed by the other side in the same cause. Then it follows that if a party voluntarily takes his cause from his attorney, the latter would be in the same situation as if discharged by his client, who JOHNSON and Another v. MARRIOTT.

could be employed by the other side. Grissell v. Peto (a) is in point. In country places where few attornies practice, if a man, after employing an attorney, discharges him and takes another, it may be very inconvenient to prevent the other side from employing the first. It is not here pretended that Mr. Jay was discharged for misconduct.

W. H. Watson in support of the rule. The affidavits show that the action was brought to recover the produce of a sale of the bankrupt's goods, illegally had under an execution. All the steps in the cause as far as notice of trial, and preparing briefs, were taken by Jay, and the case laid before counsel, if drawn by a former solicitor, is dated after Jay's appointment as such, so that he must have been acquainted with its facts. [Bayley B. The affidavits do not state that the case laid before counsel contained matter, the disclosure of which would be injurious to the plaintiffs.] The only question necessary to be decided in Cholmondeley v. Clinton was, whether an attorney is of himself at liberty to reject his client and withdraw from his suit. Lord Eldon there held, that a solicitor not discharged by his client could not become the solicitor for the other party in the same cause. munications by the client to his attorney are protected when their connection has ended, without reference to the reason for which it has so ended. That is the privilege of the client, and he ought not to be prevented from discharging his solicitor at discretion. though not guilty of misconduct. [Bayley B. The affidavits of the assignees do not suggest that they had communicated any confidential matter to Jay, the disclosure of which would injure them. Though Lord Eldon, in Beer v. Ward (b), refused to restrain the

⁽a) 9 Bing. 1.

⁽b) 1 Jac. R. 77.

defendant's solicitor from giving evidence of confidential communications which came to his knowledge while clerk to the plaintiffs' solicitor, that decision left the question of the plaintiffs' privilege open for the court before which the defendant's attorney might be called as a witness. In *Bricheno* v. *Thorp* (a), Lord Eldon admits that the rule in *Cholmondeley* v. *Clinton* is not confined to the case of a solicitor ceasing by his own act only to be employed as such, but may extend to the case of a clerk formerly in the office of an attorney opposed to his present employer, if it were shown that mischief would result from suffering him to be so employed. The facts show it to be impossible that the attorney should not have acquired a knowledge of this case.

JOHNSON and Another v. MARRIOTT.

BAYLEY B.—It appears to me that we ought not to make this rule absolute. In Cholmondeley v. Clinton Mr. Montriou, a solicitor, who had retired from his partnership with Mr. Seymour, in which they had acted as solicitors for Lord Clinton, was restrained from acting as solicitor for Earl Cholmondeley, because, as by the private agreement of the two solicitors at their dissolution of partnership, to which Lord Clinton their client was no party, Montriou was to withdraw and not to act as solicitor for Lord Clinton, that withdrawal placed Montriou in the situation of a solicitor discharged by his own act, and not by that of his It seems to have been the opinion of Lord Eldon, that had he been dismissed by his client he might have been employed by the other side. Grissell v. Peto it appears, that in a very strong case

⁽a) 1 Jac. R. 300; and see Robinson v. Mullett, 4 Pri. 353; Wright v. Meyer, 6 Ves. 280; Parkins v. Hawkshaw, 2 Stark. R. 240; Harvey v. Cleylon, 2 Swanst. R. 221 n.; Falmouth (Earl) v. Moss, 11 Pri. 455.

JOHNSON and Another v.

MARRIOTT.

of inconvenience an attorney may be restrained from acting on the other side, where he has previously obtained information which should not be disclosed by him in his new capacity. Again, in Bricheno v. Thorp Lord Eldon did not think himself warranted to interfere, where it was merely stated that a solicitor for certain parties against whom, while he was a clerk, his late master had been employed, had obtained information then, which might be prejudicial to the other side; but desired to be informed in what particular it would But the chief foundation of my opinion be prejudicial. here is, that the clients, the assignees, make no affida-The attorney here having been in the first instance concerned for them, they know and can best tell whether they made confidential communications or not to Jay, which it would be material that he should not disclose to the defendant. But no such matter is sworn to by either of them or their solicitor. It has been argued that the case drawn and submitted to counsel for his opinion, must have conveyed such information to Mr. Jay; if that were so, the affidavits should have stated that it did contain facts necessary to be kept from the defendant's knowledge, in order to prevent injury from accruing to the plaintiffs by the disclosure. If the assignees had sworn that they had made communications to Mr. Jay of that essential importance, that if disclosed to the defendant, they, as plaintiffs, would be materially prejudiced in their suit, I should have hesitated to discharge this rule, and to suffer Mr. Jay to act for the defendant; but as no assignee or creditor states that a single material fact was communicated to Jay, and the application is rested solely on the affidavits of the plaintiffs' present attorney and his clerk, whose conclusions of the amount of Mr. Jay's knowledge of the facts are drawn from his bill of costs, I am of opinion that no sufficient case is established upon which the court can make this rule absolute.

JOHNSON and Another v.
MARRIOTT.

BOLLAND B.—I agree with my brother Bayley, and for the same reasons. We are here to decide on the rights of three parties; viz. of the defendant who seeks to employ Mr. Jay as his attorney, of Mr. Jay whose interest is concerned in that employment, and of the plaintiffs, who wish to restrain the defendant from having Mr. Jay's services on this particular occasion. Now the affidavits disclose no facts sufficiently strong to warrant us in exercising our power to restrain him from acting as attorney to the defendant. The only fact on which his so acting is objected to by the plaintiffs is, that he has been before employed by them in this case and afterwards discharged by them, but without any imputation of misconduct. Now in Cholmondeley v. Clinton, Lord Eldon, after consulting all the common law and equity judges, seems to have been of opinion that a solicitor discharged by his client for any reason, other than misconduct, is differently situated from a solicitor who has withdrawn voluntarily from the cause in which he had been employed, and that he was therefore clearly at liberty to employ his talents and exertions for the opposite party: though if he afterwards communicated to the latter the secrets of his former client, or in his new employment improperly used that knowledge of them with which he had been confidentially entrusted by his original client, so as to injure or prejudice him, the court might interfere to punish him for so doing. no facts are here disclosed to warrant the interference prayed for by this rule.

GURNEY B.—I concur, but I do not say that if an attorney conducted himself so as to procure his client

JOHNSON and Another v.

MARRIOTT.

to discharge him, a court would not restrain him from acting for the opposite party, and consider his discharge to have been in truth his own act; but in the present case the plaintiffs have not shown in their affidavits that Mr. Jay was acquainted with any confidential communication made by them, the acting on which by Mr. Jay for the defendant, or the disclosure of it by him to the defendant, might prejudice them in the action.

Rule discharged.

Ashman against Bowdler.

The plaintiff's attorney may make the affidavit that the debt is unpaid, in support of a motion to enter up judgment on an old warrant of attorney, if he has been employed in managing the principal, and in receiving and paying over the interest.

GALE had obtained a rule to enter up judgment on an old warrant of attorney, which was not drawn up, the affidavit having been made by the plaintiff's attorney. It however stated that the warrant of attorney was given for a sum which the plaintiff's attorney had been in the habit of managing, and of receiving and paying over the interest to the plaintiff, and that the money was unpaid.

Per Curiam.—That sufficiently shows why the plaintiff does not make the affidavit, and that his agent has means of knowing whether the money remains unpaid or not.

Rule granted.

Doe d. FLOYD against Roe.

1833.

ADDISON moved on the consent rule for an at- Attachment tachment against the lessor of the plaintiff, for not will be issued paying costs pursuant to the master's allocatur. rule for judgment as in case of a nonsuit had been ment on the master's allomade absolute by the defendant, but no subpoena sol- catur after vas had been sued out against the nominal plaintiff, in case of nonaccording to the ancient practice.

Per Curiam.—No such step can be taken with effect solvas has against the nominal plaintiff. There has been in reality issued against the nominal a demand of the costs, though not preceded or accom- plaintiff. panied by the subpæna solvas.

In another similar case on a subsequent day, Doe d. Fry v. Fry and Barker, the master stated, that in all probability the old practice arose from the attachment being founded on a subpœna which originally issued on the equity side; upon which the court said, that as . ejectment was entirely on the common law side, and no such practice existed in the other courts, it could not be necessary in this. Attachment granted.

for not paying A costs in ejectsuit, though no subpæna

PITT against Pocock and BIGGS, Gent. one &c.

ROTH defendants being arrested on a joint writ of An attorney capias, gave bail to the sheriff.

Mansell for Biggs moved that the bail-bond might does not, since a delivered up to be expected on the ground that as 2 W. 4. c. 39. be delivered up to be cancelled, on the ground that as s. 4. lose his an attorney he was privileged from arrest. Before 2 own privilege W. 4. c. 39. an attorney who subjected himself to be cumstance; sued jointly with an unprivileged person lost his privi- for he may lege, and might be arrested, because the defendants at with a copy of

sued jointly with a person not privileged from arrest, by that cirnow be served the capias on which the

other defendant is arrested; and where an attorney so served had been arrested and gave bail, the court ordered the bail-bond to be given up to be cancelled.



that time must be sued jointly under similar process, and a capias could not be sued out against one defendant, while a bill was filed against the other. But now, by sect. 4. of that act, proceedings by bill are abolished, and a mode is provided by which privileged and unprivileged persons may be sued jointly, without arresting the former, viz. by suing out a writ of capias, of which a copy only may be served on the attorney, while the other party may be arrested upon it. That course should have been adopted here.

Follett showed cause in the first instance. The act did not intend to take away from plaintiffs their former right to proceed against an attorney sued jointly with an unprivileged person by holding him to bail, or to compel them to proceed against him by service only, though it gave them power to do so, if they pleased. In Ramsbottom v. Harcourt and Bawden (a) the court agreed that where an attorney is sued jointly with another unprivileged person, he loses his privilege from In Walker, Gent. v. Rushbury, Gent. (b), the converse of this case, it was recognized by Wood and Garrow Bs. that where an attorney has a right to sue another by capias of privilege (e.g. an attorney of another court), he may hold him to bail as one of the incidents to that right. The proviso in sect. 4. takes away no right of arrest that existed before.

Per Curiam.—This is a question on which, as it concerns proceedings in all the courts, we will consult the other judges. On another day,

Lord LYNDHURST C. B. said, We have spoken to the judges of the other courts upon this question; they

⁽a) 4 M. & S. 585.

⁽b) 9 Pri. 16; Bowyer v. Hoskins, 1 Y. & J. 199. See also Elkins and Another v. Harding, Gent., ante, Vol. I. 274; Arden v. Tucker, 4 B. & Adol. 815.

are all of opinion, that the attorney in this case does not lose his privilege by the circumstance of being sued with an unprivileged person, as means are now afforded to plaintiffs by 2 W. 4. c. 39. s. 4. by which, without arresting him, both defendants may be brought into court.

1833. PITT Pocock and Biggs.

Rule absolute.

WALTER against Cubley.

ASSUMPSIT by payee against acceptor on two A bill having bills of exchange. Plea, non-assumpsit. trial at the London sittings after last Trinity term be- able at the fore Lord Lyndhurst C. B. it was proved that the bills acceptor's own house, King's in question had been originally accepted by the de-Road, Chelsea, fendant, payable at his own residence in Chelsea, but altered by him that about six weeks after the plaintiff became the at the instance holder, the plaintiff's clerk requested the defendant to and was made alter the acceptance by making them payable at a payable at Mr. banker's. The defendant answered he had no banker, Surrey Street, but, notwithstanding, altered the acceptances by making Held, in an the bills payable at J. Bland's, Great Surrey Street, action by Blackfriars. The plaintiff had a verdict, which

Erle now moved to set aside, and (by leave of the rial and did lord chief baron) to enter a nonsuit. The alteration of not vitiate the the acceptances was such a material alteration as rendered the bill void for want of a fresh stamp. Marson v. Petit (a) was an action against an acceptor by an There, after the bill had been accepted by the defendant, Prescott & Co. was added under his name, without his knowledge or assent, by the drawer, because the plaintiff had refused to take the bill without the addition of those words; and Lord Ellenborough held, that the acceptor was still liable,

At the been originally accepted, paywas afterwards of the payee, Bland's, Great Blackfriars: payee against acceptor, that the alteration was immateWALTER v. Cubley.

as the addition of the words in question did not alter his responsibility; adding, that if they had, they would have vitiated the bill. In Tidmarsh v. Grover (a) the drawer of a bill accepted payable at B. & Co's., after keeping it three or four years, erased the name of B. & Co. and inserted E. & Co. instead, without the knowledge or consent of the acceptor, B. & Co. having failed since the acceptance. He then indorsed it over to the plaintiff, and it was held that he could not recover against the acceptor, the alteration being held material on several grounds; among others, that it held out a false colour to the holder, and superadded an order, or at least an authority, to E. & Co. to pay the bill, the consequence of which might be, that on payment by them the acceptor might have become liable to an action at their suit, and on non-payment the holder might have protested it for non-payment at a place where the acceptor had never made it payable. [Bayley B. In that case a place of payment unwarranted by the acceptor was substituted. Now the altering the original place of payment by substituting a new place of payment without authority, and for the purposes of fraud, was held forgery, in Rex v. Treble (b), where the alteration was made under similar circumstances as in Tidmarsh v. Grover.] The situation of the holder is here altered, for while the acceptance remained general, the presentment must have been to the acceptor; whereas after the alteration it is usual to make a demand at the place named on the bill (c). Cowie v. Halsall (d) is in point. There an alteration of a general acceptance by the drawer, without privity or consent of the acceptor, by adding the words "payable at Mr. B.'s, Chiswell Street," was held material, Bayley

⁽a) 1 M. & Sel. 735.

⁽b) 2 Taunt. 328; Bayl. on Bills, 4 ed. 453.

⁽c) Even since stat. 1 & 2 Geo. 4. c. 78; Macintosh v. Haydon, R. & M. 362. See Rowe v. Young, 2 Brod. & B. 165.

⁽d) 4 B. & Ald. 197.

J. saying, that on dishonour at that place, the holder might give notice of dishonour and immediately arrest the acceptor, and the bill was held to be void as between indorsee and acceptor. [Bayley B. The adding on a bill a mere memorandum of the place where it is to be paid, has been held not to make a fresh stamp necessary, Trapp v. Spearman (a). In Macintosh v. Haydon (b), after 1 & 2 G. 4. c. 78. had passed, the drawer of a bill of exchange accepted generally added to the acceptance, without the acceptor's knowledge, "payable at R. & Co. bankers, London," and then indorsed it for valuable consideration, the bill being over due, and the indorser privy to the alteration; and Abbott C. J. held, that the alteration so made was material, notwithstanding the statute, assigning the same reason in substance as had been given by Bayley J. in Cowie v. Halsall.

1833.
WALTER
v.
CUBLEY.

Lord LYNDHURST C. B.—In this case the alteration is made by the acceptor, and I do not think that it at all alters the contract, but merely indicates another place where the holder might apply for payment.

BAYLEY B.—The alteration did not qualify the acceptances, but merely amounted to a direction by the acceptor, or to express his intention that the bills might be presented at Mr. Bland's. Had the acceptor removed there from Chelsea while the bills were running, he might have said, you may now present to me at Mr. Bland's. In the cases cited the alteration was made without the acceptor's knowledge or consent; whereas here the reverse is the case, so that it was an innocent act, and a mere memorandum that for the purpose of these bills the acceptor's residence was at Mr. Bland's.

The other barons concurring,

Rule refused.

⁽a) 3 Esp. N. P. C. 57.

⁽b) Ry. & M. 362.

1833.

SIBLEY against TomLINS.

ASE for slander. The declaration contained eight A declaration for slander counts, and stated by way of inducement to six, stated by way of inducement, that the plaintiff carried on the trades and businesses that plaintiff of a retailer of beer, a pork butcher, and a dealer in was a porkbutcher, and coals; while in the two others the inducement confined then charged the statement of the plaintiff's trade to that of retailer the defendant with publish-The first count stated that the defendant, inof coal. ing to plaintiff, tending to cause it to be suspected and believed by the in presence of other persons, these words of plaintiff's neighbours that the plaintiff had been and was guilty of theft, and of the offences and misconduct and concerning the plain-tiff:—" You hereinafter mentioned, and to deprive him of the gains are a bloody thief—who and profits of his said trades, in a certain discourse stole F.'s pigs? which the said defendant had with the said plaintiff of You did, you and concerning the said plaintiff, in the presence and bloody thief, hearing of divers persons, falsely and maliciously spoke and I can prove it. You and published, of and concerning the plaintiff, these poisoned them "You (thereby meaning the plaintiff) are a with mustard and brimbloody thief. Who stole Fraser's pigs? You (meaning stone;"—inuendo, that the said plaintiff) did, you bloody thief, and I can prove plaintiff was guilty of pigit;—you poisoned them with mustard and brimstone," (thereby meaning that the plaintiff was guilty of pigjury found Special damage was laid, but plaintiff failed that the words stealing). were not into prove it. Plea: general issue, not guilty. At the tended to impute felony, trial before Gurney B. at the sittings after last term, but were the inducement and words laid in the 7th count were spoken of plaintiff in proved, and the learned baron left it to the jury, first, relation to his whether the words were used; and, secondly, whether trade.-Held, that the plainthey were used in a sense intended to impute felony by tiff was not The jury found, that they were spoken in reentitled to recover, as the ference to the plaintiff's trade, but not in a felonious words used did not show Verdict for the plaintiff for 40s. sense. that they were

necessarily spoken of him in relation to his trade, and no colloquium concerning his trade was laid in the declaration.

Erle moved, by leave of the learned judge, to enter a verdict for the defendant or a nonsuit, on the ground that no count in the declaration charged the defendant with having spoken the words of and concerning the plaintiff in his trade as a pork-butcher, or with intending to injure him in it, and that they had been found to be merely used as words of vulgar abuse. A rule having been granted,

SIBLEY
v.
Tomling.

Thesiger and Dundas showed cause. Notwithstanding the rule laid down by Serjt. Williams, in 2 Saund. 307 a. note (1), is, that words which are not actionable in themselves, but only so because spoken of a man in his trade, must be alleged in the declaration to have been spoken of him in relation to such his trade, or the declaration contains no cause of action, and judgment will be arrested, the cases of Bell v. Thatcher (a), Smith v. Ward (b), Stanton v. Smith (c), and Carn v. Osgood (d), show that words found to have been spoken, and to have necessarily related to the plaintiff's trade, office, or employment, are actionable, without colloquium laid of such trade &c. If found by a jury to have such relation, they are considered to be imported into the declaration.

BAYLEY B.—The rule alluded to on behalf of the plaintiff is, that if the words used have a natural tendency to show that a man ought not to carry on the trade he does, they are actionable. For instance, had the defendant said to the plaintiff, "You poisoned Fraser's pigs, and sold them," or "You sell tainted meat," that would have clearly charged him with an improper act in his trade as a pork-butcher; but how is it in itself actionable to say of a man in his trade, "You poisoned Fraser's pigs with mustard and brim-

⁽a) Freeman's R. 277; Vin. Ab. tit. Action for Words (T a) pl. 22.

⁽b) Cro. Jac. 674. (c) Lord Ray. 1480. (d) 1 Lev. 280.

SIBLEY

V.

Tomlins.

stone"? Such words have not that necessary connection with the plaintiff's trade calculated to prejudice him in it, which will justify a court in saying, that, without any allegation that they were spoken of the plaintiff in his trade, they are in themselves actionable. The cases are very distinct where money, or knowledge, or character are necessary to carrying on a trade or employment, and a want of either is clearly imputed by the words themselves which are used; e. g. to say of a trader or attorney, he is insolvent, or has committed a highway robbery; of a physician, he is an ass; or of a justice of peace, he is forsworn and not fit to sit on a bench; and other like instances.

Rule absolute for entering a nonsuit.

WHITEHEAD, suing with DORNING and Others, Assignees of GREENWOOD, a Bankrupt, against HUGHES and Another.

A solvent partner may sue out a writ in the name of his copartner, or, if bankrupt, in the names of his assignees, as well as his own, in order to recover a debt due to the partnership.

A Rule had been obtained to set aside the writ and proceedings in this case. Roger Whitehead and the bankrupt Greenwood had been partners in trade. After the bankruptcy of the latter, Whitehead, as solvent partner, sued out a writ in his own name and that of the assignees of Greenwood, to recover from the defendants a debt due to the firm.

Crompton showed for cause, that Whitehead remaining liable for debts due from the firm was justified in using the names of the assignees in suing for debts due to it.

, W. H. Watson in support of the rule. It is sworn that the assignees of Greenwood, having applied for payment of this money on the joint account, gave

indemnity to the defendants for paying the same to them, and it was accordingly paid them; since which time Whitehead has applied for payment. WHITEHEAD and Others v.

and Another.

Lord Lyndhurst C. B.—A solvent partner remaining liable for the debts of the firm, has a right to sue in the names of his copartner or of his assignees, if he is bankrupt; though the latter may apply to stay proceedings till he gives them security for costs, or may go into equity to prevent him from receiving the proceeds.

Rule discharged with costs (a).

(a) See 10 East, 418; ibid. 130; 1 Camp. 279. A solvent partner is entitled to retain the partnership books when the other becomes bankrupt. Et parte Finch, 1 Deacon & Chitty's R. 274.

Preedy against Macfarlane.

ISSUE was joined as of *Trinity* term, and notice of Where issue is trial given for the first sittings in this term. The joined in *Trinity* term and plaintiff countermanded his notice of trial. Price notice of trial given for the first sittings in

BAYLEY B.—The application is premature.

The joined in Trinity term and notice of trial given for the first sittings in Michaelmas term, which notice is afterwards countermanded, ichaelmas term (a).

judgment as in case of a nonsuit cannot be moved for in Michaelmas term (a).

(a) In Marshall v. Foster, moved on a previous day under similar circumstances, except that the notice of trial, which was countermanded, had been given for the second sittings in Michaelmas term. Petersdorff in support of the motion, distinguished Isuaes v. Goodman, ante, Vol. III. 559; and see Reg. Gen. Easter, 5 Geo. 4., Vol. I. Appendix, p. xii., by pointing out, that issue was there joined in the same term in which notice was given, which he contended was a step in the cause; whereas in the case before the court the plaintiff had taken no step during the term.

The Court thought the motion premature, but desired it to be renewed, if warranted by the practice of the other courts.

1833.

Megginson against Harper.

W. B., by will dated in 1812, bequeathed a to each of his and Jane on their attaining twenty-one, and having appointed two tors of his will, and three others trustees, with all necessary powers to fulfil it, died soon 1823, the trustees became possessed of the sum of 500l. retained by them from the surviving executor, as money arising from the estate of W. B. to be set apart for the pay-ment of the above legacies, being the only sum remaining in their hands to pay the They same. then advanced

SSUMPSIT on a promissory note for 5001. Plea, general issue. At the trial at the summer assizes legacy of 250l. for Yorkshire in 1832, the defendant consented to a daughters Ann verdict for the plaintiff, subject to the award of a gentleman at the bar, to whom all matters in difference, legal or equitable, between the parties were referred by order of nisi prius, power being given him, if he persons execu- should think fit, to raise any point of law in the action on the face of his award. The arbitrator in his award, after reciting, inter alia, that one Robert Brigham became a party to the reference pursuant to the order of nisi prius, stated that William Brigham of Huggate after. In April Lodge, in the county of York, farmer, by his last will and testament in writing, bearing date 9th December 1812, bequeathed to his daughters Ann and Jane the sum of 250l. each, and to his daughter Rebecca the sum of 3001, to be paid them when they arrived at the ages of 21 respectively, till which periods the expense of board, clothes, and education were to be paid by his executor and executrix. He appointed his wife Jane Brigham, and his son Robert Brigham, joint executor and executrix of his will, giving them all his personalty, subject to and charged with the above legacies; and lastly, he appointed Robert Brigham of Acton, William Megginson the plaintiff, and Thomas

this sum to the executor, and the defendant (as his surety) on the security of a joint and several promissory note signed by them, and payable with interest to "the trustees acting under the will of W. B. or their order, upon demand." The legacies not being yet payable, it was next agreed verbally, that while the legatees lived with the executor, no interest should be payable on the note. In August 1828, the executor paid Ann, who had previously attained 21, her legacy of 250l. with interest for such time as she had ceased to live with him. The surviving trustee of W. B. sued the defendant on the note in 1832 .- Held, that he was entitled to recover thereon for the legacy payable to Jane, who had come of age in the interim, the part payment by the executor to Ann having taken the case out of the statutes of limitations, 21 Jac. 1. c. 16., and 9 Geo. 4. c. 14.

MEGGINSON

HARPER.

Wilberfoss, trustees, with all the necessary powers to fulfil that his last will. Testator died without revoking his will, which was proved by his wife only on 27th July 1813. All his trustees, including the plaintiff, acted in his affairs after his death, and one of them, Robert Brigham of Acton, by his last will, dated 6th May 1814, bequeathed his personalty to the above-named Thomas Wilberfoss, and to R. L. and J. B., their executors and administrators, upon the trusts therein mentioned, and appointed them joint executors in trust of his will. Robert Brigham died 3d April 1815, and his will was proved in June 1815 by all his executors. By an indenture, dated 23d December 1817, between the master, brethren, and sisters of Archbishop Holgate's hospital in Yorkshire, of the one part, and the executors of Robert Brigham on behalf of Jane Brigham, widow, and Robert Brigham a minor, the widow and son, and also the executors of the said William Brigham deceased, of the other part, in consideration of 6901. fine paid by the said T. W., R. L., and J. B., executors of Robert Brigham, for a new income or entry into the hereditaments after mentioned, the said master, brethren and sisters demised to the said T. W., R. L. and J. B., their executors &c. the said messuage called Huggate Lodge, with the lands and appurtenances in the indenture described, to hold to them, their executors &c. in trust nevertheless and to and for the use and benefit of Jane and Robert Brigham, their executors &c. for 21 years, from 1 January 1817, at the yearly rent of 1761. 12s. 6d. subject to certain covenants. That Jane Brigham died 6 December 1818, and that Robert Brigham junior, her son, occupied the demised premises till 27 November 1822, when Thomas Wilberfoss, in consideration of 5111.8s. to be paid by him, became the occupier thereof for his own benefit. That at a meet1833.

MEGGINSON

7.

HARPER.

ing on 11 April 1823, between Thomas Wilberfors, R. L. and J. B., his co-executors of the deceased Robert Brigham, of Octon, W. Harper (the defendant), and Robert Brigham the son of the first testator William Brigham, for settling the affairs of the latter, providing for payment of such of his legacies as were then unpaid, and for settling the act count between the said Robert Brigkan and T. Wilberfoss, the said sum of 690% paid by way of fine, and that of 5111.8s. to be paid by T. Wilberfoss, were brought into account, and 11% 8s. was paid to Robert Brigham as his own, whilst the remaining 500% was retained by T. Wilberfoss as money arising from the estate of the late W. Brigham to be set apart to pay the two legacies of 250l. each to Am and Jane Brigham, being the only sum remaining wherewith to satisfy the same. Application was thereupon made by Robert Brigham, and by the defendant on his behalf, for the loan of the said 500% till the legacies should become payable, and T. Wilbertoss thereupon agreed to lend it on condition of receiving the following promissory note. "500l. Huggate Lodge, April 11, 1823. We jointly and severally promise to pay to the trustees acting under the will of the late Mr. William Brigham of Huggate Lodge, or their order, upon demand, the sum of 500%, for value received, together with lawful interest from this day." Robert Brigham and the defendant. (his surety) having signed the note, T. Wilberfose paid 500% to the defendant, who afterwards paid it to Robert Brigham. It was also verbally agreed that while Ann and Jane Brigham should continue to reside with and be maintained by Robert Brigham, such residence and maintenance should be taken in lieu of payment of interest on the money secured by the note. berfoss occupied Huggate Lodge farm and the above demised premises till his death in 1830, leaving the plaintiff Megginson the only surviving trustee of the

MEGGINSON

U.

HARPER.

will of the said late W. Brigham, him surviving. Brigham resided with Robert Brigham till her marriage on 18 April 1827, and attained her age of 21 on the 30 May in that year. On the 26 August 1828, and on several subsequent days to the 6 May 1830, sums amounting in all to 2751. 6s. were paid by Robert Brigham to her husband on account of the legacy of 2501. and interest thereon from the time of her marriage. That of Jane was not so paid, and this action was, therefore, brought on this note by the present plaintiff against the defendant, to compel payment thereof (as being part of the sum of 500%. for which the note was given) with interest from 2 December 1830, the day she, being of age, married and ceased to reside with Robert Brigham, but not till after the expiration of six years from the date of the said promissory note. The plaintiff was not indebted to the estate of the late W. Brigham or to the said Robert Brigham.

The arbitrator having stated these facts, awarded, that if the court in which the action was brought should be of opinion and adjudge on the facts and matters so found and stated by him upon his award, that the plaintiff Megginson was a proper and sufficient party to maintain the said action against the defendant, and that there was and appeared a sufficient consideration for the said promissory note to enable the said plaintiff to maintain the said action against the said defendant, and that the said action is not barred by the statute of limitations, so pleaded by the said defendant to the said action, then the verdict already entered for the plaintiff was to stand, but the damages to be reduced to 2791. 14s. with interest at five per cent. till final judgment signed; but if the court should be of a contrary opinion, then that a nonsuit should be entered.

Starkie was to have argued for the plaintiff, but the court called on

1833.
MEGGINSON
B.
HARPER.

Tombinson for the defendant. Even supposing that there is sufficient consideration for this promise to the trustees so as to support the note (a), the action is not maintainable by this plaintiff, without the joinder of Robert Brigham as co-plaintiff, he being the only executor of William Brigham who survived at the time the note was made. As such he was bound to maintain the testator's daughters till their legacies were payable on their respectively attaining 21. Neither of them in fact reached that age till after the date of the note. Then he not being a trustee of William Brigham's will, was, as executor, entitled to possession of the fund out of which the legacies were to be paid, in order to maintain them, in part at least, with the interest. No action then lies on the note, for the party necessary to be made a co-plaintiff is one of the makers of the note sued on. [Lord Lyndhurst C. B. There being three trustees and two executors of William Brigham, the question is, whether the executors, after performing his will, would not have been justified in handing over this money to the trustees, they having the usual powers as such? In that view their possession of the money during the respective minorities, would not be inconsistent with their characters as trustees, and if they parted with that possession to the defendant on the security of this note, why should no this action lie by the survivor of them to recover back ?

2dly, There is no acknowledgment in writing sufficient part payment of principal or interest to this case out of the statute of limitations, 21 Jan. c. 16., as required by 9 Geo. 4. c. 14. s. 1. The tract for support of the daughters in lieu of pointerest on the loan, is a substituted contract, an supporting them accordingly is not equivalent to

⁽a) See Ridest v. Bristen, ante, Vol. I. 87; Chitty on Bills, 8tl

1833.
MEGGINSON
E.
HARPER.



Lord Lyndhurst C. B.—The promise in the note is to pay 500% to certain persons described as "the trustees acting under the will of the late William Brightam, or their order, on demand." The question is, when ther or not a payment to one of the legatees of a same to which she was entitled under that will, within six years after the date of the note, is a part payment to the trustees as payees of the note? They having all the usual powers of trustees, it seems to me that parole evidence was admissible to show that the payment actually made was made by their permission, or by, or conformably to their authority, viz. in performance of one of the objects of their trust. That being so, the payment in question will take the case out of the statute.

BAYLBY B .- It is a well-known general rule, that extrinsic evidence is admissible to explain a written instrument, though not to vary or contradict it. The very terms of the note make it necessary to explain by such evidence what the trusts of William Brigham's will were, for the payees are described as trustees acting under it. Then does the parol evidence here admitted vary the note? It has only explained that Ann and Jane Brigham were the legatees under the will, for whom the payees as trustees held the fund. It was conformable to their duty as trustees to get possession of the fund bequeathed, in order to fulfil the purposes of their trust. When they afterwards lest it on a note payable to the trustees of William Brigmem's will, and the plaintiff, the survivor of them, sued upon it, after six years had elapsed from the date, it was open to him to show to what trust the payment made within that period by Robert Brigham to the legatee Ann was applicable.

As to the stipulation for maintenance of the legatees in

lieu of maying interest on the note, no question arises on that between these parties. If the payees, were satisfied that the makers were likely to be insolvent, they might have demanded the whole money and sued on the note (a). o destroy a for resp. i

1833. Megginson '' 'v.' HARPER.

The other barons concurred. Verdict to be entered for the plaintiff according to the award. the 'guster' (a) See authorities collected, 2 Stark. on Evid, 2d ed, 478. S. Same on dum dient old greatpas JAMES, Clerk, against Dods.

ASE for the obstruction of a way. The fifth count Unless a tithe stated, that whereas the plaintiff now is and for right of way 30 years last past had been rector of the rectory of the to carry tithe parish church of Penmaen in the county of Glamongun, lands within and as such rector, during all the time aforesaid, was his parish, by and still is lawfully possessed of and entitled to all the owner of the tithes of corn, grain, and hay, yearly growing, renewing, and proceeding upon and from a certain farm has prima and lands in the possession of the said defendant, right to use situate in the parish aforesaid, &c.; and that plaintiff, as such rector as aforesaid, by reason of such his pos- as is used at session of the said tithes during all the time aforesaid, ought to have had and used, and still of right ought to to carry off the have and use a certain way from a certain common and public king's highway in the parish aforesaid, unto and he has any through a certain gate heretofore standing and being use any other upon the said farm and lands of the said defendant, way from the anto and into a certain close of the said defendant close, because called New Close, parcel of the said farm and lands, and so back again from the said close, to and through the other agriculsaid gate, into, over, and along the said common and

off titheable grant of the fee or by prescription, he facie only a such road for that purpose the time by the occupier other ninetenths; and if further right to used by the occupier for tural purposes, or for more convenient

ali to man

use of the close, though not for the purpose of carrying off the crop, that right can only exist while such way continues, without being stopped up by the occupier.

JAMES v. Dods.

waste land, unto and into the said common and public king's highway, to go, return, pass and repass with his servants, horses, waggons, and carriages, for the purpose of gathering and carrying from and off the said close the tithes of corn, grain, and hay, yearly growing and renewing upon the aforesaid close, to wit, at.&c.: And that also before the committing of the obstruction and grievance hereinafter next mentioned, the tithe of corn, to wit, barley growing and renewing upon the said close, and then and there being of certain great value &c., had been duly set out and severed from the residue thereof in and upon the said close, for the purpose of being carted and carried away from and off the said close, to wit, at &c.: Yet defendant, well knowing the premises, but contriving &c. to deprive him of the use, benefit, easement, and advantage of his said way and the value of his said tithes, whilst he the said plaintiff was so possessed of the said tithes as aforesaid, and whilst the said defendant was so possessed of the said farm and lands, wrongfully and injuriously removed the said gate heretofore standing and being in and upon the said way as aforesaid, and wrongfully &c., erected, built, and set up a certain wall in, upon, and across the said way, in the place and stead of the said gate so removed by the said defendant as aforesaid, and hath kept and continued the said wall so by him erected as aforesaid, in, upon, and across the said way for a long space of time hitherto, to wit, at &c.: By reason whereof he the said plaintiff, during all the time aforesaid, hath been hindered and prevented from using the said way for the purpose of collecting, fetching, and carrying away from and off the said close as aforesaid, the tithes of the said corn during all that time growing and renewing upon the said close, and during all the time aforesaid hath been deprived of all the advantage which he might and would otherwise have derived from his said tithes, in the whole amounting to &c., and is by means of the said several grievances in divers other respects much aggrieved. Plea, general issue.

JAMES v. Dods.

At the trial before Patteson J., at the Lent assizes for Glamorganshire, it appeared that the plaintiff had been rector of Penmaen in that county since 1804, and was as such entitled to the tithes arising on Reddenhill farm, in the defendant's occupation, of which New Close was part. The church, parsonage, and premises were south of a road, which running nearly due east and west divided them from Park and Reddenhill farms, both occupied by the defendant to the north. houses belonging to these farms were considerably to the north. Previous to 1817, when the defendant begun to occupy both those farms together, there had for some years existed an opening from this road on its north side into New Close, which having been at first a gap in the fence, had been afterwards used by the occupiers to turn cattle into the field, and for other purposes, and had finally a gate or bar placed across it to divide the field from the road. The tithes of New Close had on three occasions been brought through it by the owner into the road, and the person who occupied Reddenhill farm before the defendant, took his furniture there that way, it being the only practicable road to that place for carts while it was held separately from Park farm. The distance from this opening to the parsonage premises was 1320 yards. A composition for tithes, which had existed between plaintiff and defendant since 1817, ceased at Christmas 1830, and before it terminated, the defendant took away the bar or gate and built a wall across the opening. The shortest way which then remained to carry tithe in kind from New Close to the parsonage, was, for a short distance, that used by the defendant to carry JAMES

JAMES

v.

Dods.

his crops home, and was in all 8520 yards long, great part of it leading to the north directly away from the plaintiff's premises to the defendant's homesteads, and from thence circuitously back to the parsonage. Another road sometimes used by the defendant to carry home his crops, was longer and more precipitous. These ways were offered by the defendant touthe plaintiff to carry home his tithes, and for the interruption of the old opening the action was brought. (16) -For the plaintiff it was contended, that where, as in this case, the road used by the occupier to carry off his crop was circuitous for the tithe owner, the latter was entitled to this old outlet to carry his tithes from: New Close, as had been previously done. For the defendant was cited Cobb v. Selby (a), to show that a farmer might alter or stop up any way used by him in the occupation of his farm, though it had been also used by the tithe owner to carry off his tithe. The learned judge doubted the application of that case, as the matter claimed was not a right of way over any road, but of exit only; and having told the jury that there was no evidence of a right of way by prescription, directed them that the general law was clear that the parson might take away his tithe by the same road by which the occupier himself used to carry off the rest of the crop, but that this was a claim, not of such a road, but of mere outlet, which he thought on the whole that the defendant might be entitled to close up; and left it to them whether the obstruction was made bonê fide by the defendant for the more convenient occupation of his farm, or with an intention to harass and annoy the plaintiff in collecting his tithes. The jury, in answer to a question by the judge, found that there had been for some years an opening at the spot in question, and that the defendant did not close it with

⁽a) 2 New R. 470; 6 Esp. N. P. C. 102, S. C. Macdonald C. B.

James James V. Doin. the ground where they grew either by the common way, (viz., the king's highway (a),) or by such way as the owner of the land uses to carry away his nine parts, but if there are more ways than one, and the question is which is the right way, this is cognizable in the temporal court (b)." In Bosworth v. Limbrick (c), lands formerly in one occupation were afterwards occupied by two persons, and the question was, whether the right to use what was the road before the separation necessarily continued after it? Eyre B. in delivering the judgment of the court said, "The parson must undoubtedly have a right of way to carry off his tithes from the place on which they arise, and the occupier must open a passage for him, or he subtracts his tithes-Ordinarily the parson is understood to have a right to use the same road which the occupier uses. If the occupier has a right, the parson has also. It is accident whether this way is more or less convenient, nearer or further; its being the nearest cannot alone give the parson a right to pass over another man's land. There having been a communication when all the lands were in one occupation, which the parson might then have been entitled to use, because the occupier used it, is no argument in support of a claim to use it when the occupation becomes several. several occupiers may have no right to use it, therefore the parson can derive no such right from them." If each occupier's right of road was there varied by the proprietor's splitting the land from the possession of one into that of several, it would by parity of reasoning be varied by the joining the Park and Reddenhill farms in one hand, as in this case. In Cobb v.

⁽a) Roll. Abr. tit. Chemin.

⁽b) See Halsey v. Halsey, Sir W. Jones, 230.

⁽c) 3 Gwill. 1109, by bill in exchequer; see also Anon. 1 Bulst. 108, stated 3 Gwill. 1572; and Berney v. Chambers, id. 673.

James F. Dods.

high road. Cobb v. Selby occurred in 1807; Burnell v. Jenkins in 1816. Six John Nicholl there says, after alluding to the peculiar circumstances of the case in: favour of the occupier, "but it must not be understood by this that the farmer may stop a way convenient! to the parson, if he open another which is convenient to himself, but which may be very inconvenient to the parson, especially if it be done with a vexatious little tention; such a proceeding may amount to an absolute: obstruction, and to a fraudulent denial of tithe. I by no means lay down that the farmer may at his pleasure stop up a gap, and subject the clergyman to unread sonable inconvenience. This is not a case of that sort." The rule which appears to have been laid down in C. P. in Cobb v. Selby, viz., that the only road by which the tithe owner may carry tithe from a close, is that used by the occupier to carry off the nine-tenths, seems to narrow the rights of the farmer to an inconvenient degree. That road may be varied by the occupier to suit his own convenience, and inflict hardship on the tithe owner by its circuitous route, nor canit always suffice for his acknowledged rights. It may only lead to the homestead of the occupier; so that on arriving there the tithe owner may be obliged finally to carry off his tithe by another private road not used by the farmer in the ordinary occupation of the particular close. In answer to a question from the bench, they answered that there was no evidence that the farmer. had ever used the outlet in question for carrying home his crops from New Close, although he might have used it for carrying them to Park Mill or Swansen, lying east.

Lord LYNDHUBST C. B.—There was no evidence to support any right of way in the rector by prescription or grant through the gateway in question, or to show that



JAMES
v.
Dods.

road used for the nine-tenths, but also to any road used by the occupier on any part of the land on which those nine-tenths grow. I will not say he has not such a right, but at the utmost it will be only co-extensive with the occupation of that way by the farmer, without depriving him of the right to discontinue it or turn it to other purposes. A right of way to carry off tithe might be granted to the tithe owner by the owner of the fee, or might exist by prescription. Such a grant would bind the owner of the inheritance and the occupier; but in the absence of either, I am of opinion that a tithe owner has no right to continue to use or occupy a way which, though used at some former period by the farmer for the ordinary purposes of cultivating a close or carrying the crop off it, has been since disused and stopped by him. Here there is no ground to presume any such right in point of fact. The road adjoined New Close, and a gap having been made in the fence, the occupier drove cattle through it into the It was afterwards used by him for purposes of his own and for the occupation of the close. In two or three instances it has been also used by the tithe owner to carry off his tithe, and if it was then one of the roads or outlets used for the occupation of the lands in question, he might have a right to use it for that purpose at that time. The learned judge would not have reserved any point of fact for us, whether there was a way by prescription or not; but left it to be argued before the Court, whether or not in point of law we ought to infer that the use of this way by the tithe owner in the manner proved gave him a right to insist that from time to time it should be left open by the occupier. My opinion is, that no such inference can be drawn from the facts in evidence.

BOLLAND B. concurred.

Rein v.
Lord
Tenterden

ested in the premises by withe of the lease, and that being strucksessed, he made his will and uppointed the defendant executor. and afterwards and during the term, before any part drithe near whiche near breach became due quand hefore the committing the supposed breach of coveriant mittle second breach. To with an 28 April 1828, died possessed thereogy and without aftering his will; and that defendant proved the same, indougles executor became possessed of the demised premises for the residue of the term; proceeded to allege, that the estate, right, title, interest, term of years to come and unexpired, property, profit, claim, and demand of the said J. A. the said lessee and testator of, in, and to the said demised premises with the appurtenances, came to and vested in him, the defendant, only as executor of the last will and testament of the said J. A. the said lessee, and that he never was nor is he possessed of or interested in, nor did he ever enter into or become possessed of or interested in the said demised premises with the appurtenances, or any part thereof, by assignment to him made, as in the said declaration mentioned or otherwise therein, save as executor as aforesaid. And further, that the profits of the said demised premises with the appurtenances, before and at the time of the death of the said J. A., and before and at the time he the defendant so became and was executor as aforesaid, were and from thence hitherto have been and still are much less than the rent reserved and made payable by the said indenture. And further, that ever since the defendant became and was possessed of the said premises with the appurted. nances as executor as aforesaid, he has paid to the plaintiff, for and towards the payment and satisfaction of the rent thereof, all the profits of the said premises. with the appurtenances, and that before the comREID
v.
Lord
TENTERDEM:

was and oramained; in his hands, and lonk for and one account of the profits of the said premises with the appurtaneous by him at any time at times received or derived therefrom, but of for and on account of all the goods and chattels which were of the said. It describe counts at the time of his ideath, which had ever come to embeen and that he has not one had he at the time of his ideath, which had ever come administered, and that he has not not had he at the time of the top profits of for from the said demised included by profits of for from the said demised premises with the appurtenances, or any goods or chattels which were of the said. It. A. the deceased at the time of his death, in his leadenst executes as aforesaid; its bareduinistered on atherway of eriv fications and has he at the other of the said in his leadensts.

Third pleaselike second adding that the said dan mised premises with the appurtanences, before and est the time refrithe, commencements of this suit, were not likely to yield, non in there any probability, that they will yield, any profit, whatsopyen for and during the resti residue, and remainder to come and unexpired of the said term, and that heatherthe defendant is not likely to have or receive mor is there, any probability that he will have or receive any goods or chattels which were of the said J. At, the deceased at the time of his death, nor is there any probability that any goods on chattels which were of the said of Am the deceased, at the time of his death; will ever hereafter come to the hands of him the defendant as executor as aforesaid to be administered: And he further says, that he, before the commencement of this suit, to wit, on 3 Propriery 1831, gave notice to the plaintiff of all and singular the premises in this plea mentioned, and affered to surrender and yield up to him the said indenture of lease and the said premises with the appurtenances, but that the plaintiff then and there refused and ever

REID

T.

Lord

TENTERDEN.

before or after the committing of the breaches of covenant in the said declaration mentioned.

The causes of demurrer to the second, plea resembled the first, omitting the objection to the first, that no allegation was made that defendant had no assets of J. A. the leaves, to satisfy the rents reserved by the indenture.

The causes of demarrer to the third plea were similar to those assigned to the second, omitting as there omitted, and adding as follows: And also for that the offer alleged in the said third plea to have been made by the defendant to render and yield up the said, indenture of lease and the premises with the appurtenances, is not alleged to have been made before the committing of the breaches of covenant above assigned, or within a reasonable time after the said defendant entered and was possessed thereof, but only before the commencement of this suit. Joinder in demureer,

Talfound for the plaintiff supported the demurrer. The substantial question on the whole record is, whather an executor having entered on premises, demised to the testator, and sund fon a constant to repair for breaches committed in his own time, can discharge himself by pleading that he has had no beneficial occupation? Rubery v. Stevens (a) would have been in point for the defendant, had the pleas been pleaded to the first breach only, without extending them to that for not repairing. That case recognizes the position laid down in Tilney v. Narris (b), notwithstanding the earlier cases to the contrary, among which seems to be The Dean and Chapter of Bristol v.

⁽a) 4 Bar. & Adol. 241.

⁽b) Ld. Raym. 553; 1 Salk. 309; Carth. 519; S. C. and cases collected 1 Saund. 1 a. and 111, notis.

Resp y. Lord Tenterder. cases proceeded will be found in Filney well-broik which was an action of oovenant against an administral tor; for breach of a covenant to repair committed in his own time. There Peers Williams for the plaintiff admitted talls the ouses to decided where insecutional against executors for breaches in their out pinist the judgments were given de bonis testateris; becads in them they were named and charged as such, sehpress in that case the defendant was charged as assigned, and as such was sought to be charged de beais pei priis; and the plaintiff finally had judgments filerd Lyndhurst C. B. It is there also argued for the planstiff that an administrator would suffer no thurdship because he might waive the term, and so discharge himself, but he could not waive the term only without renouncing the representation in toto (a) Baylow B. An executor may promptly offer to surrender the term before a breach of covenant actrus (h) But there is no allegation in the first plea, that there are no assets. Again, the allegation in the second and third pleas is, not that the defendant had no assets when the first breach occarred, but that he had none at the conmencement of the suit, or at the time of pleading. covenant to repair is a continuing covenant, of which a breach may at any time occur.] The hardship on Editor Section d A second and Land

⁽a) See Boulton v. Canham, Executor of Snow, Rollesten 125 nr. S.C. nom. Bolton v. Cannon, 1 Vent. 271; nom. Boulton v. Canon, 1 Freeman, 337; Billinghurst v. Spearman, 1 Salk. 297, and cases collected i Williams on Executors, 428.

It was also argued in Tilney v. Norris, that the administrates might assign over the term and discharge himself; but the testator's privity of contract remains notwithstanding his death; and an executor, if sped as such by election of the plaintiff after he has entered, seems still limite for breach of covenant to the extent of all the assets he may lave in an interest on the detinet, or in covenant; 1 Saund. 341 and 344 b. 11 n., 1 Bouland v. Canon, 1 Freeman, 338; House v. Webster, Yelv. 108; Helier v. Caschert, 1 Lev. 127.

⁽b) See Bolton v. Cannon, 1 Ventris, 271.

Rais to Lord Transparent stated to have existed, and the defendant might have had a large sum of money, among of the deceased. Nor is the want of among sufficiently expressed in either of the pieces.

Barrier B.—If the premies were out of repair at the testator's death, it became the executo apply his general amets to perform that repair as well as to pay any next then due. It need not b here said that he was bound to do so in preference to other claims, for no demand appears to have been quitstanding at the time of the testator's death, or any defect of assets. The pleas do not aver that the executor did all he could to make the municiples of the toms profitable. The first plea makes no allegation whatever that the defendant had no amets of J.A. to satisfy the rent reserved, or make satisfaction for breach of the covenant to repair. Now, as the rent was payable quarterly, it might happen that the amount of the first quarter's rest might either exceeds that of the assets in hand, or be much inferior to them: The offer to surrender the lease, if promptly: made said pleaded according to the fact, will help the defeathant as to all the breaches laid, particularly as far as respects the want of repair accruing after it was made, though it may not cover any preceding default in that respect (a).

Leave to amend given.

⁽a) It is said in Wentw. Off. Ex. c. 11. p. 244., c. 12. p. 290, 14th edithet if the profits of the land are of less amount than the rest, and there is a deficiency of assets, an executor may waive the lesse. And see Williams v. Caused, 3 Anst. 909, by Macdonald B. cited 2 Williams on Essecutors, 1079. Ante, p. 118, note (a).

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Elston and Others, Assignees of Elston, a Banking rupt, against Eliza Bradwick.

A person who had been discharged ender an insertvent act in 1815 became bankrupt in 1829 (3 G.4.) and obtained his certificate, but paid less than 15s. in the prand. He afterwards became possessed of property. Held, that his assignees under the commission were entitled to recover under sect. 127 of 6 G. 4.

LBT for money had and received, to recover a balance belonging to the bankrupt, and placed, by him in the Bank of Eagland. At the trial before Gurney B. at the London sittings, the facts appeared to be as follows:—In 1815 the bankrupt Eleton was discharged under the insolvent act then in force, and in 1829 became bankrupt, the plaintiffs being his assignees, and obtained his certificate. His estate paid a dividend of 1s. 6d. in the pound. In 1831 he married, prior to which his wife's property, which consisted of stock in the funds, was vested in trustees for her sole use, except a part which was sold out and lent to the husband to trade with, for which he was to account with the trustee of the settlement. The balance

c. 16. which has for that purpose a retrospective effect, notwithstanding the interest previously vested in the assignee under the insolvent act.

of these proceeds of stock thus sold out, having been placed in the Bank of England by the bushand, this action was brought by the assignees under his commission against that body, but by a rule of court the trustee was substituted as a defendant. At the trial it was contended for/the plaintiff, that as the wanksupus resusted had mot paid 15s. in the pound, his subsequently acquired effects were vested in his assignees by stat. 6 G.4. c. 16, s. 127., which enacted, that if any person discharged by any insolvent act should become bankrupt and obtain his certificate, such certificate should only protect his person from arrest, but not his fature estate. For the plaintiff it was contended, that as the bankrupt had taken the behefit of the insolvent act before 6 G. 4, c. 16. passed, he did not come within the provisions of that act. The learned baron reserved the point. For the defendant it was then submitted, that as the money sued for was the property, of the trustes for the just of the wife, it was not liable for they debts of, the thusband. The learned baron told the jury, that as the defendant had permitted the bankrupt to use his wife's property ther only remedy was by action against him. Verdict for the plaintiff for the balance claimed.

The plaintiff for the balance claimed.

A rule to enter a nonsuit having been obtained by

Follett, who cited Carew v. Edwards (a),

The Recorder (C. Law) and R. V. Richards showed case. The defendants contended that the operation of 6 G. 4. c. 16. s. 127: is prospective only, so that a discharge under the insolvent act 52 G. S. c. 165. and 53 G. S. c. 6. being prior to 6 G. 4. c. 16. cannot be connected with a bankruptcy subsequent to that act, so as to be within its provision. The word "such" in s. 127. followed by "certificate as aforesaid" refers to the effect of the certificate so

ELSTON and Others

1501

(a) 4 B. & Adol. 351.

Elsron and Others

BRADDICK.

obtained, not to the time when it was obtained, whether before or after 6 G. A. c. 16., as appears from the rest of the clause which applies to those acts of the bankrupt which precede, as well as to those that the passing of the act, and to certificates obtained before or after that time. Churchilly, Crease (a) affixes a retrospective meaning to similar words in s. 82. In Robertson y. Score (b) the inclination of Lord Tenterden's opinion was, that sect. 127 of 6 G. 4. c, 16. applied to cases where the first certificate was granted under a commission issued before the passing that act. In Fowler v. Coster (c) this point appears to have been taken for granted to be as here contended for the plaintiff. Nor does Carew v. Edwards (d) impeach the resent construction; for there the discharge under the insolvent act, and the certificate under the commission, both took place previous to 6 G. 4. c. 16. and the law as applicable to that state of things is not altered, as respects the effect of the certificate. But the certificate obtained under 6 G. 4. c. 16. has a different effect from one obtained before that act; for sect. 127 contemplates the existence of certain matters which operate on a certificate after 6 G. 4. c. 127.; and the words by which the "vesting in the assignees" of the future effects of the bankrupt is there compassed are quite new; being a consequence of the circumstances which exist when a certificate which is obtained under 6 G. 4. c. 16. attaches. Section 135 provides for a construction of the act most beneficial to creditors, and saves commissions subsisting at the times of passing the act and of its taking effect. Then a commission granted after this act attaches on the state of things which existed before it. Bayley B. If it did not, a person certificated when

⁽a) 5 Bing. 180.

⁽b) 3 Bar. & Adol. 338, 342.

⁽c) 10 B. & Cr. 427.

⁽d) 4 Bar. & Adol. 351,

der any previous bankrupt act, but arrested after 6 G. 4. c. 16. might find a difficulty in procuring his discharge under sect. 126. Then the word "certificate" in sect. 127. comprehends certificates obtained under that and every other act under which they have been had. A certificate allowed, but not issued before 6 G. 4. c. 16. must without doubt comply with that act.

ELSTON and Others 7.
BRADDICK,

Follett contral. At the passing of 6 G. 4. c. 16. the creditors of Elston, when he was discharged as an insolvent in 1815, were interested in and entitled to take the fall guessia and solvent in the property; then the question is, whether sect, the fall of the property is then the destion is, whether sect, the property is the property in the property in the property is the property in the property in the property in the property is the property in the property in the property in the property is the property in the property in the property in the property is the property in the 127 has expressed the meaning of the legislature to be to deprive them of that right, by vesting his property in another set of creditors. Section 127 is altogether prospective. If the assignees claim under that section, all the incidents mentioned in it must concur, and must have happened since the act passed, in order to vest the property in them. Under the old bankrupt as well as insolvent laws, each individual creditor might have sued the bankrupt (a). [Bayley B. The new bankrupt act, by vesting the bankrupt's property in the assignees as trustees to sue, only varies the mode in which it is to be liable to the creditors.] The words of sect.

127. "any person who shall have been discharged by such certificate as aforesaid, are said to have a general retrospective meaning, but they apply only to the time of obtaining the certificate. to the time of obtaining the certificate. Nor is an act retrospective without specific words. Bayley B. The act is prospective in applying to future sertificates, but a previous discharge under a previous act is not inconsistent with its provisions.] The act applies to the property of the bankrupt, in which not only he, but his creditors, are interested; but if that

⁽a) 5 G. 2. c. 30. s. 9.; 52 G. 3. c. 165. s. 54.

1894 Etston and Others **v**: BRAUDICK!

property que affected by write ious insolvency, "no corde perty would exist on which the assignment under the bankrupt act could operated. The previous creditors interest in, and right to take it, would remain white fedted by the circumstance, whether the commission be void or not. Though judgment has been entered upp still if they do not take possession, the property is that of the bankrupt. The words "so discharged" and "such certificate" in sect. 127. refer to sect. 121., and mena a discharge not merely out of custody, as in sect. ball; but also from debts due by him when he became baltkrupt, and from all demands made provable under the commission. This question hardly arose in Robinson W. Score, and in Corew v. Edwards a new trial was of dered on this point but the case has since been settled? In Marges of Hand (a) the court of Common Pleas thought that an act of bankruptcy bommitted after the repeaf of the former acts by 66 G.4. 4916, but before its get neral provisions came into operation, would not sub port abcommission issued after that event; and the court of MaiBu in Heuron V. Heard (b), Palmer V. Moore tel and Surtees w. Ellison (d), neted upon that decision. This Sarters v. Ellison a commission had issued in a similar manner on a trading, which took place before ITS. 14. came into operation, uand was held of old : Hi Kale 151 Cabker(k) the words in sect. 192000 shall have wiveffined the Pawere held entirely prospective of Those lieb as strongly i retrospective in in rammatical meanific as the present, but do not apply to the time of hassing the acti batto the time when the claim was about to be applied. Kayev. Goodwin (4), which wose on sect. 95: shows that 6G.4.c. 16. does not apply to the involment of proceed? ings before that note. In Bell v. Billion (2) the sections of heer first bronglift

⁽a) 4 Bing. 212. (b) 9 B. & Gr. 754, n., (c) Ibid.] (d) 9 B. & Cr. 750.

⁽e) 2 Moore & P. 720.

⁽f) 6 Bing. 576.

⁽g) 4 Bing. 615.

and 55, which were held retrospective were plainly ac expressed. Churchill, v. Greass (4) shows that payments bons fide made by sibankrupt after an act of bankreptcy, and before 6 G. 4, c. 16 game into operation or the commission issued, are protected, unless the party, had notice; but the terms of sect. 82 were not stabil they do not take possession, the coitague, or saght The words 's so discharged" and Gur and well. to " such certificate" in sect 127, refer to sect, 121, and BAKLEY Bodelivered the judgment of the cousts This was an agtion of debt by assigneed of a bankrupt for money, had end received by the defendant to the we of the bankgupt, and the question turned on the meaning of 6 G. 4. o. 16, 8, 127. The facts were very short- In August 1815, the hankruptiwes discharged under the implyent debtone and then in farce. In Auli 1820 a comprission of hankrupt insued against him, under which his astate paid in 1830 and dividend of leas than fifteen shillings in the pound, and he obtained his certificate in In 1881 he married a lady possessed of real and personal property, great part of which ver verted lingthe desendant as her trustee for her sole mee, niAs, to the residue, the wife, previous to her marriage, executed a power of cattorney to sell and transfer, im order to genuble the husband to trade with it; and, he was [to account; for it yearly with the de fendant as trustee in The atock in however, aremained in the wife's maidne; name, and after the marriage the husband sold sit 19uta and placed the proceeds to his secount, with the Bank of England. | This action was brought to recover the balance of that account. The defendant, as trustee of the wife, was aubstituted by rule: of court for the Bank of England, against whom it had been first brought.

The question is, whether the words in the early part

ELSTON and Others v. Baaddicad ELSTON and Others
7.
BRADDICK.

of 6 G. 4. c. 16. s. 127. are confined to discharges by bankruptcy or insolvency occurring after the passing of that act? or, whether they also comprise discharges happening before that period? It is, therefore, material to consider what the law was before that act passed; and we must see what was the language of the former acts relating to bankrupts, and what the language of the clause in question is. The language of sect. 127. is, "That if any person who shall have been so discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by any insolvent act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce, after all charges, sufficient to pay every creditor under the commission fifteen shillings in the pound, such certificate shall only protect his person from arrest or imprisonment, but his future estate and effects, except his tools of trade and necessary household furniture and the wearing apparel of himself, his wife and children, shall vest in the assignees under the said commission, who shall be entitled to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing the commission." If there has been such previous discharge as the act contemplates, it does not protect them from the claim of the assignees, but vests the property in them. 5 G. 2. c. 30. s. 9. was the only act in force before 6 G. 4. c. 16.; and that act provided for the discharge of the person of the bankrupt only. but enacted that his future effects should be liable: and there was a provision in the insolvent act applicable to future effects, by which the assignees might seize in execution the future effects of the party. Until 6 G. 4. c.16., therefore, bankrupt's goods were liable to the claim of each separate creditor, and to that also of

Eston and Others v.
Brappicki

his assignees under the mootent act, and between them there might be competition as to who should first setze! "The effect of 6 .4. c. 16. is to take away" this competition of creditors inter se, and to destroy the claims of the assignees of an insolvent deblor who after wards becomes bankrapt of Look at the language of 5 W. 2. d. 30 hand 6 G. 4. c. 16. There is a provision in sect. 135 of 6 G.4. E.76. that the act shall be construed beneficially for creditors. And should it turn odt that the provision 1115/6 2318 pointedly guarded. so as to apply only to discharges after that act, and that the provision in 605. 42 is general, without any such aution or guard, why should not 6 0.4. c. 46. s. 121. receive a general construction, and apply to all discharges, whether before or after? Now 5'0.2.c. 30: i.9. enacts, shi That from and after 24th June 1732, in case any commission of bankruptcy shall issue against any person of persons who after the said 24th June 132 shall have been discharged by virtue of this act, or shall have compounded with his, her, or their creditors, or delivered to them his, her, or their estate or effects, and been released by them, or been discharged by any act for the relief of insolvent debtors after the by any act for the relief of insolvent debtors after the line aforesaid, that then and in either of those cases the body only shall be free from arrest, but their future the body only shall be free from arrest, but their future offices shall remain liable to the creditors. Industrious attention is therefore bestowed to confine the operation of that act to discharges of bankrupts and insolvent debtors, where the discharges are subsequent to that act. There was good reason for that provision; the regulation was new in omnibus, and it would have been unjust to have visited with new punishment a discharge which at the time it occurred was subject to discharge which at the time it occurred was subject to no penal consequences. Not so the act 6 G. 4. c. 16; for when that act passed a bankruptcy discharge under 5G.2. c. 30. after a previous discharge under that act as

ELSTON and Others
v.
BRADDICK.

a bankrupt, or under a previous composition with creditors, or an insolvent act, made the future estate liable, if 15s. in the pound were not paid under the commission upon which the last discharge took place; but it only made it so liable if the creditors seized; and this produced a race amongst the creditors who should first be in a condition to seize.

Section 127 of 6 G. 4. c. 16. provides, that if any person who shall have been so "discharged by such certificate as aforesaid" &c. (stating the clause, ante, 128.) The difficulty arises upon the use of the word "such," such certificate as aforesaid. Had that word been omitted, there would have been nothing to have confined the other discharges by composition with creditors or discharge by an insolvent act. Had those words therefore stood by themselves, there was nothing to confine them to discharges after 6 G. 4. c. 16. came into operation. But it was argued, that the words "discharge by such certificate as aforesaid," are confined to discharges since 6 G. 4. c. 16., and have the same effect also as to discharges by composition or by the insolvent debtors' The court may doubt whether that is a legitimate conclusion; but taking the words "such certificate as aforesaid," if confined in their operation to discharges by certificates obtained since 6 G.4. c. 16., is 6 G.4. c. 16. confined to the discharges by certificates &c. (in the commencement of the clause) since that act? Sect. 121 is the first of several sections relating to certificates, and provides that every bankrupt who shall have duly surrendered and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands by this act made provable under the commission, in case he shall obtain a certificate of such conformity so signed and allowed, and

subject to such provisions as in that act are after directed; and s. 122 provides how future certificates are to be signed, introducing an alteration of the previous law. Both those sections refer to certificates introduced de novo by those clauses. Those sections apply to the new certificates introduced by 6 G. 4. those are not the only subjects to which the words " such certificate as aforesaid" are referable; there are other sections which extend to every species of certificates. Section 123 applies not to certificates under 6 G. 4. c. 16. but to certificates signed previously to 6 G. 4. c. 16. but defective as to signature of one creditor, and one creditor only. That, therefore, is another description of certificate to which the word "such" in sect. 127 would apply. But the next sect. 126 seems decisive. That clause provides, "that any bankrupt who shall, after his certificate shall have been allowed, be arrested, or have any action brought against him for any debt, claim, or demand, hereby made provable under the commission against such bankrupt, shall be discharged on common bail." The words there are not "after such certificate as aforesaid," or hiscertificate under this act: and there are no words to confine it to certificates and commissions under 6 G.4: and unless it extends to certificates and commissions under 5 G. 2. there is no protection or privilege to persons having such certificate. 5 G. 2. is repealed, so that the protection and privilege that section gave is gone, and no new protection or privilege is given, unless under sect. 126. The construction then of sect. 127, is plain; it applies, under the words "such certificate as aforesaid," to discharges under any species of certificate, either under 5 G. 2. c. 30. or 6 G. 4. e. 16., and to every discharge by composition or insolvency either before 6 G. 4. or after; and there are two cases where it must have been so considered. The

ELSTON and Others v.
BRADDICK.

ELSTON and Others v.
BRADDICK.

King's Bench does state its opinion though unnecessarily; and whoever remembers that great and eminent man Lord Tenterden, will bear testimony to the peculiar and great caution with which he abstained from deciding unnecessary points. In Fowler v. Coster (a) there had been three commissions against the defendant. third was insisted to be a void commission, which it could not have been unless 6 G. 4. c. 16. applied to commissions issued under the previous statutes relating to bankrupts; that court then acted on the principle that section 127 was applicable to that case, nor can its judgment be otherwise supported. In Robinson v. Score (b) there had been one commission before 6 G. 4. c. 16. and another after. The defendant when sued pleaded bankruptcy. I agree that it was not necessary in that case to decide whether stat. 6 G. 4. c. 16. applied to commissions founded on 5 G. 2. c. 30.; for either 6 G. 4. c. 16. does or does not apply to bygone commissions; if it does not, you have a discharge valid under 6 G. 4. c. 16. because you have one commission only, and cannot count preceding commissions: if 6 G. 4. c. 16. does apply, and you can count them, then sect. 127 of 6 G. 4. c. 16. is a discharge; for it would be most unreasonable that he should be sued when he could not be taken in execution, and when he could have no property liable to an execution. was argued on 6 G. 4. c. 16. and its operation; and the court expressed their opinion, after consideration, that it was a case within sect. 127. applicable to discharges by commission previous to 6 G. 4. c. 16.

We are of opinion, on the contrast of the language of 6 G. 4. c. 16. with that of 5 G. 2., and of those two cases, that this case is within 6 G. 4. c. 16., and that you may apply that act to by-gone commissions issued

⁽a) 10 B. & Cr. 427.

⁽b) 3 Bar. & Adol. 338.

under 5 Geo. 2. c. 30., or 5 Geo. 4. c. 98. Mr. Follett pressed that such a decision would take away from assignees of an insolvent their chance of obtaining his future property. No doubt it will have that operation; but we think that so minute an interest in those assignees as not to affect the general interest conferred by this act, and that our decision, by taking away the previous competition among creditors, does not militate against the construction which we feel ought to be given to 6 Geo. 4. c. 16.

1834. ELSTON and Others BRADDICK.

Rule discharged.

OWEN against BURNETT.

A SSUMPSIT against a carrier for not safely carrying A case cona case of the plaintiff's containing a looking-glass ing-glass of from London to Lymington, or safely delivering the above 101. same according to the direction on the said case, but on the outside on the contrary so carelessly conducting himself, that "Plate Glass' &c., and diby default of him and his servants the said looking-rected to "Col. glass became and was cracked, broken, and injured. Shedden, Elms, Lymington," At the trial before Gurney B., at the London sittings was delivered after Trinity term, it appeared that on 18th June 1831, the defendant, the plaintiff, a looking-glass maker, had sent a glass a common carrier in London, valued at 371. in a wooden case marked on one side and booked "Plate Glass" and "keep this side up," and on one there to go by his waggon.

taining a lookvalue, marked at the office of Its size was

considerable, and its weight five cwt.; a notice was fixed in the carrier's office pursuant to 11 Geo. 4. and 1 Will. 4. c. 68.; no price was paid for its carriage, but for booking only; no declaration of its nature or value was made on behalf of the plaintiff pursuant to sect. 1 of the act; nor was any increased rate of charge for the greater risk and care incurred in its conveyance, or any engagement to pay the same asked or accepted by the defendant's servant on receiving the package. It arrived in Lymington, and was forwarded from thence on a narrow truck without springs, along a smooth road to the Elms, where it was discovered to be broken. The jury found negligence, and gave the plaintiff a verdict for the value of the glass: Held, on motion to enter a nonsuit, that the nature and value of the article in the case not having been declared at the time of delivering it at the defendant's office, and gross negligence not being found by the jury, the carrier was protected by the express words of 11 Geo. 4. and 1 Will. 4. c. 68. s. 1.

OWER v.
BURNETT.

edge "keep this edge up," directed to "Colonel Sheddon, Elms, Lymington," on a spring van driven by his carman to the defendant's waggon office, White Horse Yard, Friday Street. The plaintiff's packer proved that the glass was screwed to and through the back of the case, but no battins or bavins or laths were used inside the case to prevent the glass coming too near the bottom or edges of it. It was booked at the defendant's office, and the booking paid for by the plaintiff's carman, without its value being asked or declared, and without any increased charge or engagement to pay the same by way of insurance, being accepted by the book-keeper. The contents of the case were not there examined. A notice framed pursuant to 11 Geo. 4. and 1 Will. 4. c. 68. s. 2. and 3., (a), was affixed at the time in a conspicuous part of the defendant's office, under a pent-house against the warehouse wall, where all goods sent for carriage were delivered. On the same day the case was dispatched by the defendant's waggon lying flat on soft bales, and on arriving at Ly-

(a) Vis. as follows. In pursuance of an act of parliament passed in the first year of the reign of Will. 4. c. 68., intituled "An act for the more effectual protection of mail contractors, stage-conch proprietors, and other common carriers for hire, against the loss of or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof:"

Notice is hereby given, That for any package to be conveyed for hire, or to accompany the person of any passenger, containing gold or silver coin of this realm, or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, motes, or securities for payment of money English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, fars, or lace, or any of them, to a greater amount in value than

17.

1834. Owen BURNETT.

mington, was laid flat on a long narrow brewer's truck without springs, and with its edges extending much over the sides of the truck. Thus placed, it was drawn by one horse along a smooth road for about a mile to the house of Col. S., and left in the passage there. Up to this time no rattling of broken glass had been heard, but when unpacked it was found to be broken, and was sent back to the plaintiff, who refused to take it or pay for the carriage. Coleridge Serjt. for the defendant contended that the plaintiff must be nonsuited, the value and nature of the package not having been dedared by the person delivering it, and no increased charge or engagement to pay it having been accepted by the person receiving the package. The learned buron reserved the point, giving leave to move to enter a nonsuit, and left it to the jury to say, whether it was carefully carried from London to the place to which it was directed (a), and whether the defendant was guilty of any negligence which occasioned the accident; adding, that if it had happened by negligence of the plaintiff or his packer, the defendant was entitled to a verdict; and secondly, whether a notice was put up in the defendant's waggon office, pursuant to 11 Geo. 4. and

ten pounds, the increased charge over and above the common and ordinary charge for carriage is as follows:

For any distance aot exceeding	For each pound sterling in value, the sum of
50 miles	one halfpenny.
75	three farthings.
100	,one penny.
150	three halfpence.
200	seven farthings.
250	two-pence.

This notice is in the form now universally adopted by the land carriers since the above act.

⁽⁴⁾ A carrier is bound safely to deliver a parcel at the place to which it was directed. Per Wood B., Bodenham v. Bennett, 4 Pri. 31, recognized 3 Br. & B. 182, by Dalles C. J. in Duff v. Budd.

1834.

OWEN

v.

BURNETT.

1 Will. 4. c. 68. s. 3. The jury found for the defendant on the last question, but, upon the first, found that the defendant had been guilty of negligence, and gave the plaintiff a verdict for 37l. the value of the glass (a). A rule was obtained in last term according to the leave reserved at the trial, Lord Lyndhurst observing, that as it was obvious that the mode of conveyance which might suit a small glass, would be highly improper for a large one, the knowledge of its value was the more important.

Platt showed cause in this term. This case does not come within the operation of 11 Geo. 4. and 1 Will. 4. c. 58. s. 1., the object of which, as appears from the recital, was to prevent carriers from being made liable without adequate consideration, for increased risks in conveying packages, which, from their small size, would not on the view of them appear to require more than ordinary care, though containing articles of great value (b). Among these articles "glass" is enumerated. the present instance the case sent was of considerable size, weighing 5 cwt., marked "Plate Glass," with directions enjoining particular caution, thus bearing on the face of it the character of value. Now by the proviso in s. 4. no public notice or declaration of value shall affect the common law liability of carriers in respect of any articles to be carried by them, but they shall be liable as at common law to answer for loss of or injury to articles in respect whereof they may not be entitled to the benefit of the act. Here, though no value was orally declared, the bulk and description of the package sufficiently declared its value. The act was only intended to put carriers in the same situation

⁽a) Note, no particular carrier had been pointed out by consignec. See 5 Burr. 2680; 3 Br. & B. 177; 1 T. R. 659.

⁽b) As in Batson v. Donovan, 4 B. & Ald. 21.

in which they were before, in cases where knowledge of the notice (a) usual before the statute restricting their common law liability, could be brought home to the owners of the goods: but in numberless cases for losses occasioned by their gross negligence they have been held liable, though the goods were above the value limited in such notice, and were not specially entered or insured; Birkett v. Willan and Others (b), Duff and Others v. Budd(c), Batson v. Donovan(d), Smith v. Horne (e), Lowe v. Booth (f). Thus that notice was held to protect the carrier only in cases when ordinary care was exhibited by him; nor has this statute any further operation; for if it has, it might be said that this glass might have been sent the whole way by the truck, because its value was not declared to the carner (g). If then it is granted that before this act a carrier was liable for gross negligence after the usual notice given by him, negligence or not was a question for the jury, and the act does not apply. [Bayley B. Negligence is found to have existed, but not its character or amount. If the case should be sent to another jury on account of the insufficiency of the verdict on that head, the question raised for the defendant on the act might be put on the record.]

1834. OWEN υ. BURNETT.

Coleridge Serit. and W. C. Rowe contra for the defendant. The general words of the enacting part of

(e) 8 Taunt. 144.

⁽a) In Smith v. Horne, 8 Taunt. 146. Burrough J. fixed the date of the inst recognition of the doctrine of notice to be 1785; Forward v. Pittard, 1 T. R. 27. and lamented its having been ever introduced into Westminster Hell.

⁽c) 3 Br. & B. 177. (d) 4 B. & Ald. 21. (b) 2 B. & Ald. 356. (f) 13 Pri. 329.

⁽g) It may be remarked, that by proviso in sect. 8, " nothing in the act is to be deemed to protect carriers from liability to answer for loss or injury to any articles arising from the felonious acts of any servant in their employ, or to protect such servant from liability for any loss or injury occasioned by his personal neglect or misconduct;" gross negligence by the carrier or his zervant being thus left as at common law.

OWEN

U.
BURNETT.

s. 1., cannot be restrained from due effect, because the mischiefs recited out in the preamble are only pointed out in particular words (a). That section is to be read by itself absolutely, being intended to protect carriers, whether of large or small packages, by means of the declaration prescribed. It enacts, that no carrier by land for hire shall be liable for the loss of or injury to several specified articles (b), including glass, contained in any parcel or package, which shall have been delivered either to be carried for hire, or to accompany the person of any passenger in any public conveyance, when the value of the article contained in the package shall exceed 101., unless at the time of delivery at the receiving house of such carrier, or to his book-keeper, coachman, or other servant, for the purpose of being carried or accompanying the person of such passenger as aforesaid, the value and nature of such article shall have been declared by the person sending or delivering the same, and such increased charge as thereinafter (in sec. 2.) mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package. By sect. 2., when any package containing any of the above specified articles shall be so delivered, and its value and contents declared as in sect. 1., and such value exceeds 10l., such carrier may demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public

⁽a) See the cases collected Bac. Abr. tit. Statute (I). Vol. 6. 381, 6th edit.

⁽b) Vis. gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any practices stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the banks of England, Scotland, and Irsland respectively, or of any other bank in Great Britain or Irsland, orders, notes, or securities for the payment of money, English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or animanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them.

and conspicuous part of the office, warehouse, or receiving house, where such packages are received for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles: and it further enacts, that all persons sending or delivering packages conthining such valuable articles as aforesaid at such office, shall be bound by such notice "without further proof of the same having come to their knowledge." By s. 3., when the value has been declared, and an increased mte paid or engagement to pay it accepted, the carriers are to give receipts for the package acknowledging it to have been insured, and are to lose the benefit of the act if they do not give such receipt or affix the notice specified in sect. 2. Sect. 4. has been stated (a). By s. 5. every office &c. used by a carrier for receiving parcels to be conveyed, is to be a receiving house within sect. 1.

Owen v.
Burnett.

The object of these and other provisions of the act was to put an end to nice questions of liability, and lay down a broad rule of dealing between carriers and ewners of property, which should be suited to the changed circumstances of modern society. To effect this object the legislature has exempted carriers from liability for loss or injury who has not declared the neture and value of the article carried. So that even if a package, which by its description or size would put the carrier on his guard as to its value, vas brought to him or his coachman &c. for carriage, a declaration of that value is equally necessary, or he is protected by the words of sect. 1. Glass, which is one of the articles specified, refutes the argument that the act only extends to articles of great value packed in small compass, for its value increases with its size.



If its value did not exceed 10l., the carrier would have been liable, without any declaration; but if it did, its size was not that information of its value to which he was entitled by the act, which required its value and nature to be declared, that he may apportion the increased rate of insurance accordingly. On this view of the act, it might be contended that even if no notice were affixed in the office, a declaration of nature and value will be a condition precedent to bringing an action against a carrier in cases within sect. 1., except the loss accrued by the felonious acts provided against by It has been argued that this act is to be substituted for the notice by which, before it passed, carriers by their own act attempted to limit their common law liability. To sustain a defence grounded on such a notice, i. e. to prove a special contract between the parties for the carriage on specified terms, it was necessary to bring home to the party whose goods had been lost or injured, a knowledge that the carrier had so limited his liability (a). But that is now altered by sect. 2. If a package is delivered at any intermediate place on the road between the termini of the journey, and no declaration of the nature and value be made, will not sect. 1. apply to relieve the carrier from liability for loss of or injury to the articles enumerated., although no notice is put up pursuant to sect. 2 and 3, in the office, warehouse, or receiving house where such package is delivered, but only in the offices at the ends?

Then, if the carrier's exemption from his original liability no longer stands on the contract made with him in derogation of the common law, but on the act of parliament, the words of the latter in sect. 1 and 2 must inevitably prevail; and it can hardly be said that since this act the legislature intended that a carrier should be bound to carry at increased risks

⁽a) Gouger v. Jolly, Holt's C. N. P. 318; Clayton v. Hunt, 3 Camp. 27.

where he had not an opportunity to receive an increased rate of profit. Besides, in the cases cited, as well as in **Brooke v.** Pickwick (a), the jury found gross negligence, without reference to the nature of the articles conveyed. In the latter case the trunk which was rifled had either not been placed on the coach at all, or insecurely placed there. The placing this package on the truck might be injudicious: but gross negligence or wilful misfeazance is not here found (b). [They were here stopped by the court.]

OWEN
v.
BURNETT.

BAYLEY B. (c).—We entertain no doubt that this case is within this act. The article carried falls within the words used in the first section, so that unless we see something there restraining its operation to particular descriptions of glass, and excluding it from this particular one, the act applies. Now it has been argued for the plaintiff that the section does not apply to the glass article in question, because it was of considerable size and weight; and it appears from the preamble to section 1. that increased risk had arisen to carriers from the practice of sending by public conveyances by land for hire, packages containing money, bills, notes, jewellery, and other articles of great value, in small compass, without such notice to them of their nature or value as would enable them by due diligence to protect themselves against loss by depredation. But is the enacting part controlled by those words of the preamble "articles of great value in small compass?" If it had been the intention of the legislature to confine the provisions of sect. 1. to the articles of small size but great value there enumerated, they would have been found not only in the preamble, but

⁽a) 4 Bingh. 218.

⁽b) Vis. The absence of that care which a prudent man would take of his own property; Bodenham v. Bennett, 4 Pri. 31; Duff v. Budd, 3 Br. & B. 182.

⁽t) Lord Lyndhurst was sitting on the equity side.

OWEN v.

in the enacting part of that section. The terms of sect. 1. are however general, and include every thing. Among the articles which it enumerates is glass, the value of which increases with its size; but it also mentions plated articles, the value of which, at least as compared with plate, is not in any degree commensurate with the size of the article. The terms of the section are general, and there seems no reason why it should not be applied to any glass article if exceeding 10% in value. The carriage of glass requires particular attention, and imposes peculiar risk on the carrier, from the brittle nature of the commodity; and the term "glass" in the act being unlimited, we should not be justified in saving that it applies to small glasses only, and not to glass of every description. The object of the legislature was to enable the carrier to provide against the common accidents of a journey, and not merely against Then there is a stipulation applicable to this particular article of glass, that the carrier shall not be liable, unless the nature and value of the article be declared and an increased charge or an engagement to pay it be accepted by the person receiving the package. That had a twofold object, viz., the apprising the carrier of the nature of the article, in order to his giving it the greatest degree of protection on the road, and the giving him increased compensation for his greater risk and liability. But in this case he was only paid according to the rate for an ordinary risk, though notice was fixed in the office of the terms on which glass would be carried. I think that this case is within the act, and that therefore the plaintiff cannot recover for the loss sustained; no wrongful conduct or gross negligence amounting to a misfeazance having been established to take the case out of the protection intended by the statute. Gross negligence has in many cases been held to affix a liability on a carrier to which he would not have otherwise been subject. Thus, had

1834. Owen v. Burnett.

the defendant dashed the glass on the ground, that wrongful act would have made him liable. In one case where the carrier was held liable as for gross negligence, he delivered the article to a wrong person (a): in others, a mode of conveyance different from that agreed for was substituted (b), and in another, the article was carried to a point beyond the right one, or, as in Smith v. Horne (c), it was left unprotected in a cart in a street in London. In all those cases misfeazance had taken place; whereas here there is no misfeazance or gross degree of negligence throwing the responsibility on the carrier notwithstanding the act. The supposed negligence here imputed is that of carrying a package containing glass on a truck for a mile along a hard smooth road. But if that mode of carriage was not the safest, still, had the carrier been informed of the value, he might have used a greater caution amounting to extraordinary diligence. consequence is, that the rule for entering a nonsuit must be made absolute.

VAUGHAN B.—On the plain construction of this act I am of opinion, that in order to make the carrier liable the consignor is bound to make a declaration to him of the nature and value of the goods to be conveyed, when they are of any of the kinds enumerated in sect. 1.; and that so doing is a condition precedent to any right to sue the carrier. Had gross negligence appeared, the carrier would have been liable notwithstanding the act.

BOLLAND B. had left the court to attend chambers.

GURNEY B .- I concur in thinking that in this case

⁽e) Birkett v. Willan, 2 B. & Ald. 356; Duff v. Budd, 3 Br. & Bingh. 356; very similar circumstances.

⁽b) Viz. Stage-coach for mail; Garnett v. Willan, 5 B. & Ald. 53; Start v. Fagg, 5 id. 342; Wright v. Snell, 5 id. 350.

⁽c) 8 Taunt. 144; Holt's N. P. C. 643. In Batson v. Donovan, 4 B. & Ald. 21, the parcel was left in the mail in the street at Berwick-on-Tweed.

1834. OWEN 77. BURNETT.

the declaration of the nature and value of the glass was a condition precedent to recovering against the carrier for any thing short of wilful misfeazance. of that' opinion at the trial, but as the question on the act was new, I thought it safest by giving leave to move to bring it for the consideration of the court.

Rule absolute.

Doe on demise of Maslin against Packer.

An ejectment was brought and notice of trial given in December for the next assizes, but without paying the taxed costs of a former ejectfor the same premises by the defendant against the lessors of the plaintiff, in which judghad against the casual ejector, and possession delivered to the rule after-

YRWHITT had obtained a rule, calling on the lessors of the plaintiff to show cause why all further proceedings should not be stayed till the taxed costs of a former ejectment brought in the K. B. on the demises of the defendant and one Pettit, for the same premises, against the present lessor of the plaintiff, and also the costs (a) of an action for the mesne ment, brought profits of the same, brought by the defendant against him should be paid. The affidavit of the defendant's attorney stated, that on 13 May 1833 the present lessor of the plaintiff was served with an ejectment on the demises of the defendant and another, to recover the ment had been premises in question, and that judgment was signed in K. B. against the casual ejector, and the defendant

(a) Doe d. Pinchard v. Roe, 4 East, 585. See contrà, as to damages in defendant. A action for mesne profits, Doe v. Barclay, 15 East, 233.

wards obtained for staying the proceedings in the second ejectment till such costs were paid, together with those of an action for mesne profits, was made absolute. Such a rule will not be enlarged in order to set off the costs claimed against any to which the lessors of the plaintiff may become entitled on the trial of the second ejectment. (See Reg. Gen. Hil. 2 Will. 4. No. 93.)

put in possession by the sheriff on 29 July. Defendant soon after brought an action for the mesne profits, which is still pending. On 30 September the present ejectment was served on defendant to recover the same premises, both parties claiming under J. P.; the defendant by his will, and the lessors of the plaintiff deducing title under an instrument said to have been executed by him. Issue having been joined on the 17 December, notice of trial for the Berkshire assizes next ensuing was then given.

Doe v. PACKER.

R. Alexander showed cause on affidavits that the declaration in the former ejectment, served on Maslin, was not explained, or more than a small portion read to him, and that he remained ignorant of its meaning till the writ of possession was executed. He also suggested that this application was too late after notice of trial given, and that at all events the rule should be enlarged till after the trial of the present ejectment, when the costs now claimed might be set off against those recovered by the lessors of the plaintiff, if successful.

Tyrobitt in support of the rule. First, as to the service, a sufficient knowledge by Maslin of the object of the declaration appears on the affidavits, notwithstanding the fact there disclosed, that Maslin interrupted the explanation of the contents and threw the declaration into the street. It was afterwards seen in his attorney's hands. Next, this rule was obtained in time; for no expense can be fairly supposed to have been yet incurred in preparing for trial at the next assizes. In Doe d. Chadwick v. Law (a), where a similar objection was made, the rule had not been

(a) 2 Bla R. 1158.



obtained till six days before the day for which notice of trial of the second ejectment had been given at the sittings; but though the expense of preparing for trial and bringing witnesses to town had been there incurred according to the notice, the rule was made absolute. On the last point, Reg. Gen. Hil. 2 W. 4. No. 93, (a) shows, that the costs, even if cotemporaneous, could not be set off between the parties to the prejudice of the attorney's lien.

BAYLEY B.—Under all the circumstances of this case, I am of opinion that this rule should be made absolute. Application should have been made to the Court to set aside the judgment against the casual ejector on the ground of any irregularity which might have been supposed to have existed in the service; but no such application was made even after the action for mesne profits was brought. It also appears to me, that this notice of trial could only have been given at so early a period as it actually was, in order to prevent this motion. The rule is perfectly clear, that after a party in an ejectment has failed to appear, or has had judgment, he cannot proceed in another action to recover the same premises, while the costs of the former ejectment against him, brought on the same title, or between the same parties, remain unpaid. No special circumstances exist in this case to exclude the operation of that rule against the present lessors of the plaintiff. With respect to the proposed enlargement of the rule. in order to set off the costs if the present action shall succeed, the costs now claimed would be subject to the attorney's lien in these particular suits against which the set-off is sought; so that by the general rule cited

no set-off of costs between the parties could be allowed to the prejudice of that lien.

1834. DOE PACKER.

VAUGHAN and GURNEY B.s concurred.

Rule absolute.

CLARANCE against MARSHALL, Clerk.

DEBT for money had and received by the defendant In 1810 the to the use of the plaintiff: plea, general issue. defendant's The particulars of demand were for 1211. 10s., for rent seised of cerof certain copyhold land in Essex, alleged to have been tain freehold, received by the defendant on account of the plaintiff, was interfrom September 1826 to September 1832. At the trial mixed certain before Gurney B. at the London sittings after last which she Trinity term, the circumstances of the case were nearly as follows:—It appeared from the copies of the court 1804. She rolls produced in evidence, that in July 1790, Amos her, the de-Swan, who had been admitted to a copyhold in the fendant and an menor of Garnons, in Essex, surrendered it to the use who was

with which copyhold, to had been admitted in left surviving only daughter, shortly after

admitted to the copyhold, and married in 1815. The defendant remained in possession of the freehold ever since as tenant by the curtesy; and also of the copyhold ever since, letting them both from time to time together at an entire rent, and never recognizing any right in his daughter or her husband to either copyhold or rent. No title was proved except from the court rolls of the manor. It was insisted that the defendant's possession must be taken to have continued for the protection of his daughter's right, and that he was therefore her agent for receipt of the rent of the copybold, liable to an action by her husband to recover it, as money had and received to his use. Held, that the husband could not maintain that action against the defendant without proving such an agency, or some recognition by him of his daughter's right, so as to establish a privity between the plaintiff and defendant, and avoid the question of title, which would otherwise have arisen.

Scable, the husband might sue alone.

1834.
CLARANCE
v.
MARSHALL.

of his will, by which he bequeathed his whole property, consisting of some freehold intermixed with copyhold, to his widow for life, to Elizabeth his daughter, wife of J. Freeman, for life, to J. Freeman for life, and lastly, to his grand-daughter (the wife of the defendant) for life, and to the survivor of the four(a). Mrs. Marshall having survived the three former devisees, and claiming by descent as sole heiress of Swan, took possession of the freehold, and in October 1804 was admitted tenant of the copyhold, being described on the roll as sole heiress of Elizabeth Freeman, there described as owner of the fee to herself and her heirs. In 1810 Mrs. Marshall died intestate, seised in fee of both freehold and copyhold, leaving a daughter a sole heiress, who in the November of the same year was admitted tenant of the copyhold. The defendant administered to his wife, but it did not appear whether he was cognizant of the fact, that either she or his daughter had been admitted, nor was it shown that the daughter was a minor or not at that time (b). From the time of his wife's death in 1810 to that of the action brought, the defendant had the entire uninterrupted possession of the copyhold as well as the freehold, and let them from time to time, but always together to one tenant at an entire rent(c), and constantly received the rents without accounting to his daughter. There was no distinct evidence whether the rents were received by him or not in his wife's life-time after her admission in 1804, but it was not disputed that they

⁽a) See Tomlinson v. Dighton, 1 Peere Williams, 149.

⁽b) It was suggested, that on the death of Mrs. Marshall in 1810, the lord conceived the defendant to be entitled to the copyhold as tenunt by the curtesy, which he supposed to be the custom of the manor. On subsequent search of the rolls no instance proving such custom appeared, whereas the heirs of female copyholders dying intestate leaving husbands, had been always admitted on such deaths taking place.

⁽c) The copyhold was in value 10l. a year, one-fourth of the whole.

were, and there was no other evidence of the title of any party to the premises except from the court rolls. In 1815 the defendant's daughter married the plaintiff.

CLABANCE v.
MARSHALL.

Upon this evidence, Coleridge Serjt., for the defendant, objected that the plaintiff's claim being virtually for rent, and there being no proof of privity between the parties or that defendant had ever admitted any right of the plaintiff or his wife to the copyhold, the question resolved itself into one of title, which could not be tried in this form of action, Marshall v. Hopling (a); and also that though the defendant's liability prose, if at all, from an implied contract, the foundation of which was the wife's title, she was nevertheless not joined in the action as co-plaintiff; and the learned Baron gave leave to enter a nonsuit, subject to which the plaintiff had a verdict for 601. A rule having been obtained accordingly,

Erle showed cause. First, the action of indebitatus assumpsit for money had and received, has been held to apply to a case like the present, where though no contract between the parties can be shown, money has come to the hands of the defendant which he has no right to keep, and which ought to have been paid to the plaintiff, e. g. the profits of an office usurped by the defendant; Arris v. Stukely (b). The defendant came into receipt of the rent of the copyhold in 1804, as husband of the heiress, and continued in it in her right till 1810, afterwards till 1815 as guardian of his daughter, and since as bailiff or agent to her and her husband. That is not a possession by the defendant adverse to the right of his daughter, so as to

⁽a) 15 East, 309.

⁽b) 2 Mod. 260; see 2 Lord Raymond, 703.

CLARANCE v.
MARSHALL.

raise a question of title which would not be triable in this form of action. The defendant did not hold adversely to the title of his daughter but consistently with it, for he having staid in after her title accrued by admission consequent on her inheritance, must be taken to have received the rent as her bailiff, though he originally came in in right of his wife. The presumption of law is, that he entered as father and guardian of his daughter, the heiress, in order to protect and preserve her possession; see Plowden, 306; Co. Lit. 242 a; Lit. s. 396; 1 Rolle's Abridg. 659, tit. Disseisin (C) pl. 13. p. 659 (a); Bull. N. P. 102 b, Page v. Selsby. And the law will not presume an adverse claim by him. [Bayley B. Doe v. Keen (b) shows that where a mother died and her copyhold descended to her daughter, she, if an infant, might consider her father's entry as being for her use, so as to transmit her right to it to her heirs. The length of his possession will not make this possession adverse, for the origin of it being shown, it will be presumed to continue the same in the absence of positive evidence to the contrary, Doe d. Fenwick v. Reed (c). Arris v. Stukely (d) was indebitatus assumpsit for money received by the defendant to the use of the plaintiff for the profits of an office, and Pollexfen, for the defendant, argued that that form of action would not lie for want of a privity of contract; but the court held the contrary, saying an indebitatus assumpsit for rent received by one who pretends a title, for in such case an account will lie. Hasser v. Wallis (e) is a case where a woman whose rents had been recovered

⁽a) The passage in Rolle is thus stated in a similar title and placitum in Viner:—If guardian by nurture makes a lease by indenture to one being under the title of the infant, rendering rent to himself, which is paid accordingly, yet this is not any disseisin to the infant. P. 3. Ja. B. R. per Tanfield.

⁽b) 7 T. R. 386.

⁽c) 5 B. & Ald. 232.

⁽d) 2 Mod. 260. 263.

⁽c) 1 Salk. 28.

Clarance v. Marshall.

1834.

by a person who she supposed her husband, was held intitled to recover them from him in this form of action, after discovering that he had a former wife living. Lindon v. Hooper (a) will be cited to show that ejectment was the proper remedy by which the possession and mesne profits might have been recovered from the tenant in possession, but it seems that he would be discharged by payment to the defendant, the apparent owner, without notice to the contrary from the party entitled (b). Secondly, assuming the present to be the proper form of action, the plaintiff was not obliged to join his wife as a co-plaintiff. [Bayley B. Can this plaintiff, who has a joint estate with his wife, never having been admitted to sole seisin, maintain this action in his own name? The husband's right results from the wife's legal copyhold interest in and right to the seisin of this land before coverture; then if she alone is legal copyholder, she only, or her husband joined with her, are entitled to the legal profits.] That might apply had the action been use and occupation of the wife's land. [Bayley B. Bidgood v. Way (c) shows, that to join her in that form of action without alleging the land to be hers in the declaration, is error.] But many cases cited in Comyns's Digest, tit. Baron and Feme, (X.) (d) show that in actions for a rent or profit accrued during coverture to the husband in right of his wife, he has the option to join his wife or sue alone, in which last case the damages would go to his executors, whereas in the former they would survive to her. But this is not an action in respect of the land, or

⁽a) Cowper, 418; see 15 East, 313.

⁽b) 1 Salk. 28. Qu. See Cunningham v. Lawrents, Clerk, 1 Bac. Ab. 260, 6th edit.

⁽c) 2 W. Bla. 1236.

⁽d) Particularly Osborne v. Walladen, 1 Mod. 273. per Twisden J., supporting Wise v. Bellent, Cro. Jac. 442.

CLARANCE U.
MARSHALL.

an ejectment on a wrongful possession, but is founded on the implied duty of the defendant as bailiff to account to the plaintiff in right of his wife for money received as profits of the estate. The plaintiff may sue alone for that money as a chattel of his wife, and the presumption of law under the cases of relationship is, that the long possession of the defendant was not adverse to her right. [Bayley B. Could the husband alone have maintained ejectment?]

Coleridge Serjt. contrà. On the first point it has been assumed that the defendant could have no title to the possession but that under which his daughter claimed as heir, and that assuming her to have a good title, his possession could not be adverse so as to work a disseisin. For this purpose it was insisted that this case bore an analogy to the doctrine quoted from Plowden, Coke, and Rolle, that the entry and possession by a younger brother are considered to take place on behalf of the elder, on account of the privity of blood between them, (a) in order to rebut the presumption arising from all the facts, viz. that the defendant's long possession was adverse, and to make him a bailiff or agent to his daughter in respect of the rent of the copyhold. But there is no proof of her infancy at her mother's death, so that Doe v. Keen (b), in which Lord Kenyon rested his judgment on the fact of infancy of the heir at the death of the ancestor, does not apply. [Bayley B. There is no evidence that the father knew that his daughter had been admitted, that he ever accounted since 1810, or that his title was the same as her's.] His possession

⁽a) No longer in force as to transactions subsequent to 1 Jame 1833; 3 & 4 W. 4. c. 42. s. 13,

⁽b) 7 T. R. 386.

1834.
CLARANCE
v.
MARSHALL.

has been apparently continuous and undisputed since 1810; he has from time to time let the copyhold together with the freehold, of which he is confessedly tenant by the curtesy, without accounting to his daughter or recognizing her title. Jayne v. Price (a) shows, that the circumstance of long uninterrupted possession in the neighbourhood of the party who had the apparent right to disturb it, is strong to show that possession to be adverse, and to rebut the presumption of a previous seisin in fee in another, from whom it would, in such case, have descended to the party who did not Again, as this form of action is founded on the supposed agency of the defendant to his daughter, the plaintiff was bound to show her admission, after which the whole became a question of title not triable in this ection, Marshall v. Hopkins (b). [Vaughan B. Cunningham and ux. v. Lawrents, Worcester spring assizes 1788, 1st Bac. Abr. 6 ed. 260, tit. Assumpsit, (A.) the question was, whether, when the defendant claims title, an action of assumpsit for the rents received will lie against him; and Wilson J. nonsuited the plaintiff, being of opinion that the action should have been framed in ejectment. The defendant may have thought himself to be tenant by the curtesy by the custom of the manor, which would be adverse to his daughter's title, though derived from the same He cannot be shown to be tenant to her. he could be shown to be her bailiff, his lessee must be the plaintiff's tenant, and use and occupation would have been sustainable against him; but neither he nor his lessee, the actual occupiers, could be sued in that action for use and occupation, for want of privity of contract in both cases. Nor is that an action in which to try the title to land, per Lord Kenyon, Trin. 37

⁽a) 5 Taunt. 326.

⁽b) 15 East, 309.

CLARANCE v.
Marshall.

Geo. 3. (a) [Bayley B. The same principle is acted on in Lindon v. Hooper(b), on the ground that a defendant may be unprepared to meet, in this form of action, the questions which belong to another. the party who had paid money for release of cattle taken damage feasant under a distress which turned out to be illegal, was not allowed to recover it back as money paid, on the ground that had he sued in replevin or trespass, the defendant would have been properly prepared to meet the various questions which would arise respecting the distress.] Nor is there privity between the plaintiff and the defendant as to the receipt of this money, Stephens v. Badcock (c), Baron v. Husband (d). This never was the money or rent of the plaintiff recovered by the defendant (e), for the defendant had let the copyhold, assumed to belong to the plaintiff, at an entire rent, with his own freehold. No action of account would lie here as in Arris v. Stukely (f) it would have done for the known fees of the plaintiff's office received by the defendant. Thus, in Howard v. Wood(g), the Court say it would be hard, perhaps, to maintain this action even for the fees of a steward of a court-leet were it then a new case. In both those instances it was probably permitted, in order to prevent the necessity for an assize. In Arris v. Stukely it is said arguendo, where one receives my rent I may charge him as bailiff or receiver, so if one receives my money without my order; but that does not apply to cases where there is any question about the

⁽a) MS. cited in Woodfall's Landlord and Tenant, 2d ed. 434.

⁽b) Cowper, 418.

⁽c) 3 B. & Adol. 354.

⁽d) 4 B. & Adol. 611.

⁽e) See Yates v. Bell, S B. & Ald. 643; Williams v. Everett, 14 East, 583.

⁽f) 2 Mod. 260.

⁽g) 2 Levinz, 245.

CLARANCE v.
MARSHALL.

It seems to us that some evidence was necessary to be given for the plaintiff to establish the relation of agent to the plaintiff. But here was nothing to show the copyhold to have been dealt with, or rents received by him in that character, or any otherwise than as He had let the land in question from time to time, and was not shown to have recognized the plaintiff or his wife as his principals. No title in any of the parties was shown, except from the court-rolls; from them the title appeared to have been only in the wife of the defendant and his daughter, but whether the defendant was privy to, or appeared at the admission of either did not appear; and though admission is in general necessary to clothe a party interested in copyhold with a legal right to it, it is known to be easily obtained, as it is left to other means of proof to show how the party admitted is entitled to the estate in the However that may have been, we are of opinion that in the absence of proof of agency of the defendant, or recognition by him of any paramount right in his wife, his daughter, or the plaintiff her husband, the present verdict cannot stand. might have been in the plaintiff's power to have proved such agency at the last trial, had that point been insisted on, or as it might be procured in the event of a new trial being granted, we think that the plaintiff should have the option of having a new trial on payment of costs, or submitting to judgment of nonsuit.

LEWIS against EICKE.

1834.

ON the 4th November the sheriff of Kent seized Where on a goods at the house of the defendant under a tes- by a sheriff tatum fi. fa.; and on the 5th was ruled to return the under the adwrit. On the 6th he was served with a notice by the act,1 & 2 W. 4. defendant, Charles Eicke, that the goods were the claimant did property of, and claimed by, William Eicke. Eiche was the defendant's brother. The sheriff there- charged the upon obtained a rule under 1 & 2 W. 4. c. 58. calling rule as reon the execution creditor and claimant to appear and plaintiff in the maintain or relinquish their respective claims to the cause, and goods.

Hutchinson showed cause for the plaintiff, on affida- and called vits throwing suspicion on the transaction between the on him and brothers, and noticing that the notice of claim was to show cause not given by W. Eicke but by the defendant.

The claimant did not appear, upon which the fol-should not pay lowing rule was made: -" That the said rule be dis- the plaintiff charged, as far as regards the plaintiff in this action, their respecand that the claim of W. Eicke, named in the said rule, tive costs occasioned by be barred, the sheriff to have six days time to return the rule. the writ of fi. fa. herein, and that the defendant and the said W. Eicke respectively show cause on the second day of next Hilary term, why they, or one of them, should not pay to the plaintiff and to the said sheriff their respective costs of and occasioned by the said rule, on notice of the rule to be given to the defendant, and also to W. Eicke.

Afterwards in this term Humfrey showed cause on behalf of W. Eicke against the last-mentioned rule, which was made absolute against the defendant Charles Eicke.

verse claim W. not appear, the court disgarded the barred the claim of the the defendant why they, or one of them, and the sheriff 1834.

SUMMERS against Moseley, Esq. Sheriff of Shropshire.

A party served with a subpœna duces tecum is bound to produce the ment in court, and need not be sworn. Thus 271. 2s. 7d. in an action aupon 32 *Geo*. 2. c. 28. for a penalty incurred by the act of his officer in taking a party arrested under mesne process to a tavern, without his free and voluntary consent, it was held, that the officer. after being served with a tecum on the part of the plaintiff, must produce his warrant in court without its being necessary to swear him as a witness.

arrested party to publichouses within twenty-four

hours from the

arrest without lodging him in gaol within that time, is not a beginning to "carry to gaol" within 32 G. 2. c. 28. s. 1.

Semble, if a party is arrested on mesne process, and when called on by the officer to name a safe &c. dwelling-house to which he will be carried, names his own house, to which the officer objects pursuant to sect. 1. of the act. he cannot be carried to any tavern &c. without his free consent.

EBT on 32 Geo. 2. c. 28. ss. 1 and 2., for penalties. The first count stated the arrest of plaintiff by the defendant, then and there being sheriff of Salop. required docu- by virtue of a writ of capias, at suit of William Goodall, directed to the said sheriff, and indorsed for bail for That plaintiff being so arrested for the gainst a sheriff cause aforesaid by virtue of the said writ, defendant not regarding the statute &c., conveyed and carried &c. the said plaintiff so by him, the said defendant, arrested and being in his custody by virtue of the said writ, to a certain tavern, alehouse, and public victualling house, belonging to one W.S., called the New Inn. situate and being in Bridgnorth, without the free and voluntary consent of him the said plaintiff, and against his consent and will, and did then and there keep and detain him the said plaintiff, so by him the said defendant arrested and being in his custody, by virtue of the subpænaduces said writ, at and in the said tavern &c., ten hours then next following, without his free &c. consent, and against the consent and will of him the said plaintiff, contrary to the said statute, &c., concluding under the statute for a penalty of 50l. to the plaintiff, being the party grieved.

That plaintiff being so arrested and Second count. Carrying an continuing in custody &c., defendant further disregarding &c., afterwards did carry and begin to carry the said plaintiff to a certain gaol within the said sheriff's

Summers v.
Moselet.

bailiwick, to wit, the gaol of our said lord the king of and for the said county, situate and being at Shrews-bury, in the county aforesaid, within 24 hours from the time of the said arrest, to wit, within the space of 11 hours from that time, against the will of the said plaintiff, contrary to the form of the statute &c., whereby &c., (not averring that the plaintiff had not refused to be carried to some safe and convenient dwelling-house of his own nomination &c.)

Third count, that plaintiff being so arrested and continuing &c., the said defendant further disregarding &c., did afterwards and whilst the said plaintiff was being carried on his way to gaol by the said plaintiff, as in the said second count mentioned, convey and carry &c. the said plaintiff to a certain other tavern &c. belonging to one M. R. called the White Hart, situate at Much Wenlock, in the county aforesaid, without the free and voluntary consent of him the said plaintiff, and against his consent and will, and did then and there keep and detain him the said plaintiff, so by him the said defendant arrested and being in his custody, by virtue of the said writ, at and in the said last-mentioned tavern &c. for and during the whole of the night of the day last aforesaid and until the morning of the following day, the same being a long space of time, to wit, the space of ten hours, without the free and voluntary consent, and against the consent and will of him the said plaintiff, contrary &c.

Fourth count, for carrying plaintiff to another tavern &c. called the *Mermaid*, in *Shrewsbury*, without his free &c. consent.

Fifth count, for conveying and carrying plaintiff to the private house of a certain officer of the said deferdant as sheriff, without the free and voluntary consent of him the said plaintiff, and against his SUMMERS v.
Moseley.

consent and will, and keeping and detaining him there for an hour, whereby &c.

Sixth count, for conveying plaintiff to another tavern &c. belonging to one J. G., called the Mason's Arms, situate at Shrewsbury. Plea: general issue. At the trial at the last assizes for Shropshire, before Gurney B., it appeared, that a writ of capies against the plaintiff, at suit of one Goodall, having been delivered to the defendant, he issued a warrant for his arrest, directed to three officers, named Kinsey, Ambrose Jones, another Jones, and to the county jailor. On the morning of the 22d May Kinsey met the plaintiff in Bridgnorth, and telling him he had a warrant against him at Goodall's suit. asked if he would pay the debt or give bail? The plaintiff answered, he would give bail. Kinsey asked him where he would go to? Plaintiff answered, to his brother's, which was a few yards off, that being also the plaintiff's own place of residence, (see 32 Geo. 2. c. 28. s. 1.) Kinsey said, no, we will go to the New Inn; plaintiff objected, that he and the landlord were at variance, but Kinsey said, they should not see him. and they continued to walk together in that direction, as they had previously done; and, on arriving there. went into the house, where the follower remained with the plaintiff all day. Kinsey, having gone elsewhere, did not return till the evening, and after much negociation about a bail-bond, the refusal of which by the officer formed the subject of a second action, Kinsey proposed to plaintiff, at ten o'clock at night, that, as his friends did not come forward, he should go with him to Shrewsbury, there to see the Ambrose Jones to whom the writ was also directed, in order that, as the plaintiff was connected with him, he might be induced to settle the debt. They accordingly

set out in Kinsey's gig for that purpose, and, on getting near Wenlock, Kinsey asked the plaintiff to name the house where they should spend the night; on his answering, the White Hart, they slept there, and next day went to Shrewsbury, to the Mermaid Inn, to see Ambrose Jones, who was expected there. not being arrived, Kinsey and plaintiff walked together to the house of the former, and afterwards towards Jones's house, but stopped at the Mason's Arms on the way for an hour, from whence they went to the Mermaid, where Jones came and took a bail-bond executed by the defendant and one Elcock. was given to the defendant's attorney, who was in the under-sheriff's office, to produce the writ and warrant. After protest by the under-sheriff against producing the writ in this action against the sheriff (a), he produced the writ which had not been returned (b). The wit was thus indorsed, "This writ was executed by me the 22d May 1833, by arresting the defendant. W. Kinsey." Next, in order to connect the sheriff with the act of his officer, Kinsey having been released in all the three actions, was then called by plaintiff, on his subpæna duces tecum, to produce the warrant. refused to produce it till sworn as a witness; but on an intimation from the court, produced it, leave being given to the defendant to move for a nonsuit, if it had been improperly received. It was identified by the under-sheriff, as having been lately returned by him to the officer who had left it at the office, as was often his practice: whether the warrant was thus returned to him before or after the notice to produce it had been served by the plaintiff on the defendant's attorney, did

SUMMERS v.
Moseley.

⁽a) See Snowball v. Goodricke, 4 B. & Adol. 541.

⁽b) The sheriff had not been ruled by the plaintiff to return the writ, when the writ or executed copy might have been procured from the custos breing

SUMMERS v.
Moseley.

not appear (a); and, on comparing the writ with the warrant, the indorsement on the former was discovered; but it was not shown to be the course of office for the under-sheriff to write on the writ the name of the officer selected to execute the warrant, though it was the course to enter his name in a book kept at the sheriff's office containing entries of the writs. This book was sent for at the judge's request to the undersheriff, and the entry inspected, but it did not mention Kinsey's name. No course of office, calling on the bailiffs to indorse on writs the day of their execution, was proved. It was next objected, that the second count, charging the defendant with carrying and beginning to carry the plaintiff to the county gaol, was not supported in evidence, no "carrying to gaol" being shown; and that a "beginning to carry" was not actionable within the act. The plaintiff had a verdict on the two first counts for two penalties of 50l. each, with leave to the defendant to move to enter a verdict for the defendant, or reduce the damages to one penalty only. In Michaelmas term a rule was granted on both points; Bayley B. observing on the latter, that Dewhirst v. Pearson (b) showed, that in a case where the party is actually carried to prison, the twenty-four hours are to be counted from the arrest to the time when the officer began to carry him thither.

Ludlow Serjt., and Whateley showed cause. Davis

⁽a) Upon this Bayley B. remarked, that to return it to the officer after the notice would not have been proper, and seemed to think, that if the officer parted with the custody of the warrant by returning it to the sheriff, its safe place of deposit was in the sheriff's office, and not in the officer's hands; and that if it was directed to more than one officer, it was the sheriff's duty to be aware which of them had executed it.

⁽b) Ante, Vol. III. 242; see Simpson v. Renton, 5 B. & Adol. 35. S. P.

1834. Senemas 2. Moseley.

Blatch v. Archer (a), Scott v. Marshall (b), Snowball v. Goodricke(c). [Bayley B. Evidence of a regular course of that sheriff's office was given, but the indorsement there relied on "Radford and Co." is not so strong as that made in this case.] On the second point the object of the statute was remedial, to prevent the party arrested from being hurried away from his friends within 24 hours, so as to have no time to procure bail-an act equally injurious to him as if he was taken absolutely to gaol in that time. [Bayley B. The only question is, when the defendant began to carry the plaintiff to gaol? That depends on whether he was actually carried thither.] Deukirst v. Pearson (d) shows that beginning to carry to gaol within the 24 hours is against the act, though he be not lodged there within that time. Putting a defendant in course of removal towards gaol within 24 hours from the arrest, entitles him to the benefit of this act, whether he be lodged in gaol or not; or he might have been carried about the country in custody without remedy under this act, not having been finally lodged in gaol. The distinction between "gaol" and "prison" in the act are, that one is the sheriff's county gaol, the other, any other place of confinement within the county.

The Court intimated their clear opinion that the plaintiff had not been "carried to a gaol or prison' within the act, by accompanying the office rto the different imps and other places in Wenlock and Shrewsbury.

Talfourd Serjt., and Godson, in support of the rule. The counsel for the plaintiff relied on the warrant to prove the connection between the sheriff and the bailiff

⁽a) Cowp. 63. (b) Ante, Vol. II. 257. (c) 4 B. & Adol. 541.

⁽d) Ante, Vol. III. 242.

without calling extrinsic evidence of that fact. [Bayley B. I think the evidence was complete to go to the jury before the writ was put in.] The main point whether there is authority in the crown or its courts of justice to call on a person to produce a document belonging to him, without his being entitled to be sworn as a witness, is still open to argument, notwithstanding the misi prius decisions since 1822. The clause of duces tecum was engrafted on the original subpæna in order to call on the party summoned to appear as a witness to produce a document also, but is not absolately imperative where the witness has an interest in it as his authority to do a particular act; Miles v. Dawson (a). [Bayley B. In every case where the party subpænaed brings the document into court, the judge has a discretion to prevent the production of it, if it would expose him to penalties or be prejudicial to his clients (b). The liabilities of witnesses for not appearing pursuant to process should be considered. The stat. 5 Eliz. c. 9. s. 12., gives a remedy by action sgainst persons on whom any process out of any court of record shall be served to testify or depose concerning my cause depending in any court. [Bayley B. I could not find a precedent of a subpœna before the statute of Elis. It is probable that the language of that act was afterwards adopted in the writ in order to secure the remedy given by sect. 12.] It has never been decided that a man is bound by this writ to produce a document of his own in any court. In Rex v. Netherthong (c), the rated inhabitants' overseer called on behalf of his own parish to produce a certifcate from the parish chest, would have been incom1834. Summers v. Moseley.

⁽a) 1 Esp. R. 405.

⁽b) See cases collected 1 Stark. on Ev. 2d ed. 87, n.

⁽c) 2 M. & S. 337.

SUMMERS v.
Moseley.

petent as a witness for the party calling him, but being the mere depositary of the parish muniments, was or that account suffered ex necessitate to produce the document in question. [Bayley B. Consider the effec of a subpœna calling on a stranger to produce a parti cular document of which he is possessed, without a clause requiring him to testify.] If that clause migh be left out, a party in the cause might be served with the other clause of duces tecum to which the subpæn would then be reduced, the objection to his giving evidence in his own case being removed. [Bayley B That would be improper, for he should have notice to produce, which if disobeved lets in secondary evidence but could not the production of documents in evidence by a person not a party to the cause be compelled before the time to which the clause of subpæna duce tecum can be traced? Such a power must have always resided in the crown for the advancement of justice is the king's courts.] Still it would be only in the cha racter of witness subpænaed to testify and depose that the party could be compelled to produce any document In Morgan v. Brydges (a) in 1818, the inconvenience under which a plaintiff labours in this species of action in being often obliged to prove the connection between the sheriff and himself, by the bailiff, the real defend ant in the cause, was pressed on Abbott C. J., who however held, that as he had been called as a witness he might be cross-examined. [Bayley B. There he was unnecessarily examined for the party who called There, as well as in this case, the sheriff being the defendant on the record might have called him as his own witness. In this particular case secondary evidence of the warrant might have been given.] In

⁽a) 2 Stark. N. P. C. 314. See Rex v. Brodie, id. 472; Recd v. Jones, 1 id. 132.

Rex v. Brooke (a), a witness who was sworn and produced a document was not asked a question, yet the same learned C. J. held the defendant entitled to cross-examine him. Lord Ellenborough had held the same in Reed v. James (b).

1834.
Summers
v.
Moseley.

Cur. adv. vult.

BAYLEY B. afterwards delivered the judgment of the court.—The question was, whether a bailiff to a sheriff having been called to produce a warrant had a right to insist on being sworn according to the ordinary forms used towards witnesses, which would give the counsel for the defendant the opportunity of crossexamining him, or whether the plaintiff could insist on the warrant being produced by him without his being sworn as a witness. As the cases which were cited in the argument were decided at nisi prius, we postponed our judgment in order to take an opportunity of conferring with the other judges. The result of our communication has been, that the decisions at nisi prius relied on for the plaintiff were rightly made, and that a sheriff's officer may be compelled to produce his warrant without its being necessary for the party calling him to have him sworn, or to ask him any question. There were particular circumstances in this case which might have made it unnecessary to decide this point (c); but as it has been argued, and is a question desirable to be settled by laying down a distinct rule of law on it, we have thought it right to pronounce our opinion.

The origin of the writ of subpœna duces tecum does not distinctly appear. No instance has been found of it before the reign of Charles 2.; Amey v. Long (d).

⁽a) 2 Stark. N. P. C. 472. (b) 1 Stark. N. P. C. 132.

⁽c) The learned haron had thrown out, that as Kinsey's name was indoned on the writ which was produced from the sheriff's office, that indonement might be sufficient to connect the defendant with the act of his officer.

(d) 9 East, 473.

SUMMERS v.
Moseley.

But there can be little doubt that writs of subpœna to require the attendance of witnesses and the production by them of instruments in their possession, must have been in use before the passing of the act 5 Elis. c. 9. There must have existed a common law right in the crown, for the purposes of justice, to compel by subpæna the attendance of every person cognizant of the subject-matter in suit, and also to produce any document bearing on that subject-matter, though in the possession of a stranger to the suit. Such a stranger is only called to produce a paper as and for the required document, not to identify it, which would be done by extrinsic evidence. In numberless cases, as the party producing a paper is wholly ignorant of every circumstance of the case, it would be absurd to swear him as a witness. When a party called on his subpœna duces tecum to produce the document required, disobeys the writ by not so producing it, I have no doubt that he is liable to attachment. Whether he could require to be sworn, not to give general testimony in the cause, but to make true answers as to the custody of the document only, is another question. But we think that he has no right to require the party who calls him to have him sworn in that way which would make him a witness in the cause for all purposes, for he might be a mere stranger to the document, though having the custody of it. witness, therefore, in this case was properly called on to produce the warrant, and that production was properly enforced without swearing him.

> Rule for entering a verdict for the defendant discharged; verdict to stand for the plaintiff for one penalty.

In a similar case in the K. B. in *Easter* term 1834, a rule for a new trial moved for on a similar ground was refused on the authority of this case (a).

(a) And see Rush v. Smith in this court, Trinity term 1834, post.

1834.

Evans qui tam against Moseley Sheriff of Shropshire.

Summers against Same.

The first action was brought on 23 Hen. 6. A bail-bond c. 9. for the penalty of £40 thereby imposed on persons refusing to take sufficient bail when tendered to arrest took an officer making an arrest on mesne process; and the shown to have second was brought by Summers, the party arrested, for borne that the treble damages given by the same statute to the day, though party grieved by a like refusal. The declaration in not executed each case, after stating the arrest of the plaintiff by the was conditiondefendant under a writ of capias at suit of Goodall, directed to the defendant and indorsed for bail for should within . 271. 2s. 7d., averred that Summers tendered and offered from the date to the defendant, so being sheriff as aforesaid, reason-thereof, incluable sureties of sufficient persons, to wit, one S. S. of of such date, &c., mercer, and T. E. of &c., timber merchant, two cause special good and lawful men of the said county of Salop, they in the Exthe said S. S. and T. E. being then and there responwill and sufficient persons, and having and each of them &c. according having sufficient within the county of S. aforesaid, in and practice which said county the said W. S. was so arrested and of the said so in custody as aforesaid, and who then and there were in penal acwilling and offered to become bail and sureties for the tions on 23 said W. S., that within eight days after the execution for refusing to of the said writ on him, inclusive of the day of such take bail, that execution, he should cause special bail to be put in for with such a him in the court of Exchequer to the said action, substantially according to the exigency of the said writ: Yet the comply with said defendant, diregarding his duty and the statute, of process act, did not take the said bail or sureties, but wholly refused 2 Will. 4. c.

dated the day on which an date on that till the next, ed that the defendant eight days bail to be filed certain action to the form court. Held, Hen. 6. c. 9. a bail-bond condition did the uniformity 39., which by the form in

Schedule No. 4. requires a defendant, within eight days after executing a capias on him, to cause special bail to be put in in the action at the hazard of the plaintiff's proceeding against the sheriff or on the bail-bond.

EVANS
v.
Moseley.
Summers
v.
Same.

so to do, and wrongfully kept and detained the said W. S. in the custody of the defendant as aforesaid.

Both causes came on for trial at the Shropshire assizes after the case last reported, and the testimony there given (see ante, p. 160.) was by consent permitted to stand as having been repeated in each of them. It was also proved, that the instrument produced as a bail-bond had been refused by the bailiff's follower in the absence of the bailiff on the day it bore date, viz. 22d May, which was also the day on which the arrest took place, but was not in fact executed till the next day. Its condition was as follows: "That if the above bounden W. Summers do and shall, within the space of eight days from the date hereof, inclusive of the day of such date, cause special bail to be filed in his majesty's court of Exchequer at Westminster, in a certain action, in which W. Goodall is plaintiff and the said W. Summers is defendant, according to the form and practice of the said court of Exchequer, then this present obligation shall be void, but otherwise shall remain in full force and virtue." The plaintiff had a verdict for a farthing in each case, Gurney B. refusing to certify in favour of the plaintiff for costs, giving the defendant the same leave to move as in the last reported case, and also reserving A motion was afterwards made in other objections. Michaelmas term in arrest of each judgment by

Talfourd Serjt. First, the bail-bond declared on and proved was not the obligation contemplated by 32 Hen. 6. c. 9., for by that statute no sheriff is to take any obligation for any person in his ward by course of law, but on condition written that he shall appear at the day and place "contained in the writ." That part of the act is still in force (a), and is not repealed by 2 Will. 4. c. 39., to the form of capias annexed to which act in Sche-

⁽a) See 32 Geo. 2. c. 28. as to the rest.

EVANS
v.

Moseley.
Summers
v.
Same.

bond and declaration might be different. Rules having been granted as prayed,

Ludlow Serjt. and Whateley showed cause in this term. The condition of the bond to appear is conformable to the uniformity of process act, 2 Will. 4. c. 39., and is a substantial compliance with 23 Hen. 6. c. 9. The court then called on

Talfourd Serjt. and Godson to support the rules. To the arguments used on obtaining them, they added, that as a party might be arrested one day and give a bail-bond the next, and the day of the date of the bond was not necessarily that of the execution of the writ, the declaration should have averred on what day it was so executed, and that the bail-bond declared on was taken on that day. [Bayley B. As the sheriff must be taken to know on what day he made the arrest, the declaration need not aver it.]

BAYLEY B.—The act for uniformity of process, 2 Will. 4. c. 39. requires in its form of a writ of capias, Schedule No. 4., that special bail shall be put in by a defendant within eight days after the execution on him of that writ, inclusive of the day of such execution. The bail-bond in question is conditioned for putting in special bail in this court to the action within the space of eight days from the date of the bond, inclusive of the day of such date, according to the form and practice of this court. It was shown not only to bear date on the day on which the writ was executed by the arrest of Summers, but also to have borne that date on that day. Then if the condition of the bail-bond in question does not in terms correspond with the enactment of 2 Will. 4. c. 39. It does so in substance; and as that

later act has enlarged the "day to be kept" by the defendant, by giving him a different day for the filing special bail, the previous enactments of 23 Hen. 6. c. 9. apply to the new day so provided. These rules must therefore be discharged.

1834. EVANS v. MOSELEY. Summers v. Same.

The other Barons concurring,

Rules discharged. (a)

(a) See Hillary v. Rowles, 5 B. & Adol. 460; Thompson v. Dicas, ante, Vol. III. 873.

EDMUNDS against Downes.

ASSUMPSIT by payee against maker of a pro- In order to missory note of the defendant, dated 15th January take a case out of the Plea: the general issue and the statute of statute of limi-At the trial before Gurney B., at the last tations, a letter from defendlimitations. summer assizes for Shropshire, it appeared that the ant to plaintiff plaintiff was one of the executors of his father, who was put in, in which were the bequeathed the residue of his personalty among his following children, among whom was the defendant's wife. The be most happy defendant being indebted to the testator at the time of both interest his death in a sum considerably exceeding his wife's and principal share, he and his wife signed a receipt for the amount as soon as convenient;" and of such share, and the defendant gave the plaintiff the inasubsequent promissory note in question in part of the balance due pay no more from him to the executors. The plaintiff took this interest till we have a fair setnote as part of his own share of the testator's residue. tling." Other

words:"I shall letters of the defendant ac-

knowledged a debt, but spoke of a settling between him and the plaintiff. Held, that in order to enable the plaintiff to recover, some evidence must be given that a time had arrived when it was convenient to the defendant to pay; and semble also that the settlement alluded to had taken place between the parties. Whether the date of an acknowledgment of debt made in writing pursuant to 9

G. 4. c. 14. s. 1. can be proved by extrinsic oral evidence, quære.

Louryne L. Louryne

Interest had been paid on it down to 0th March 1826. In order to take the case out of the statute of limitations, it was shown that in mower to repeated applications for payment made subsequently to the last payment of interest, the defendant sent the plaintiff a letter without a date, of which the following is an extract:

"I shall be most happy to pay you both interest and principal as soon as convenient. I believe the greatest part of what I received from your father has been returned amongst the family, and it is high time the executors had brought the business to a conclusion. Such lawyers as they employ will perhaps eat up the principal and interest. Surely the day is not far distant when a final settling may be expected; you are all pretty punctual in asking me for interest, but never say a word about allowing interest for the remainder of the money due from the share money of your late father. I shall pay no more interest till we have a fair settling Should you ever have occasion to write to me again you may direct to me in a very different way from what you do. Esquire would suit a great man like yoursel much better than an humble individual like me, who has not paid interest which you say was due on the 6th of March last. Still your well wisher,

Wednesday evening.

Thomas Downes, but no esquire."

The time at which this letter was delivered to the plaintiff was spoken to as having been in *December* 1826 by his brother, who said he remembered having their brought it from the defendant by a festive occasion or which he then went to the plaintiff's house; but the precise time did not appear to be satisfactorily established. In the spring of 1829 the defendant met *Humphreys* another brother-in-law of his, who applied to him for

EDMUNDS v.
Downes.

"Sir,—As to money, I have only to say that I have none to spare, neither do I think you can reasonably expect any from me, till you have satisfied me that you have not a good deal to pay me out of your late father's effects; when your accounts are properly looked over by a competent person, if anything is really due from me to you, you may rely upon having it the first convenient opportunity, but I will not again ruin myself by selling my stock and taking in other people's to consume the produce of the farm"

The defendant's counsel contended, first, that as no date appeared on the first letter, it was impossible to say to what 6th *March* its last line applied, and that it was not therefore a sufficient acknowledgment in writing within 9 Geo. 4. c. 14., and that the date could not be supplied by oral evidence. Secondly, that if it could, and the written acknowledgment was sufficient, it did not contain an express promise to pay, but a promise to pay when convenient, of which convenience or ability to pay no evidence was given; *Tanner* v. *Smart* (a). The plaintiff having had a verdict subject to a motion for a new trial on the above points,

Jervis in Michaelmas term last, moved accordingly; and Lord Lyndhurst having asked whether a promise to pay as soon as convenient, or at the first convenient opportunity, did not import a promise to pay in a reasonable time, a rule was granted; against which

Talfourd Serjt. now showed cause. As to the first point, it was held in Lechmere and Others v. Fletcher (b), that a promise to pay the defendant's proportion of a debt due to the plaintiff from himself and another, made in writing more than six years after the original

⁽a) 6 B. & Cr. 603.

transaction, but within six years before the action brought, was sufficient within 9 Geo. 4. c. 14. s. 1., though it did not express the amount of the debt; and extrinsic evidence was held properly admitted to prove that amount; à fortiori, it was competent for this plaintiff to supply the date of this letter in a similar manner. But 9 Geo. 4. c. 14. does not require that the time at which the acknowledgment was written shall appear on the face of it. To hold that it must, would be gratuitously to engraft a new condition on the statute. All that it does require is an acknowledgment in writing signed by the party chargeable thereby within six years. That has been proved. Can it be argued that oral evidence cannot be received since that act, when, before it passed, if a letter was given in evidence to take a case out of the statute of limitations, the post mark might be received as evidence of the time when it was in the post office, whose mark it bears? (a) So the water-mark on the letter would be evidence when the paper was made. Bayley B. Actual payment of part may still be proved by oral evidence, so as to take a case out of 9 Geo. 4. c. 14. (b)] The testimony of the witness called to prove the fact when the letter was delivered, was of a higher kind than a written date, which might have been improperly introduced on the document at a wrong time. [Bayley B. The admissibility of evidence cannot be decided by the strength of it.]

On the second point, the defendant's expressing that he should be most happy to pay the plaintiff both principal and interest as soon as convenient, cannot be construed to be a conditional promise to pay. Ability to pay

1834.

EDMUNDS

v.

Downes.

⁽⁴⁾ See the cases 2 Stark. on Ev. 2d edit. 456.

⁽b) But a verbal acknowledgment of having paid part of a debt within su years will not be admissible since that act; Willis v. Newham, 3 Y. & J. 518; see Haydon v. Williams, 7 Bingh. 163.

Edmunds v.
Downess.

may co-exist with inconvenience in so doing; e.g. when parties meet, when another account is settled, &c. Tanner v. Smart (a), the defendant's acknowledgment was in these terms: "I cannot pay the debt at present, but I will pay it as soon as I can." Those words implied non-ability to pay at the time, and the promise was therefore held conditional merely, throwing on the plaintiff the onus of proving the defendant's ability to pay. But a promise to pay when convenient refers to another time for payment, without implying want of means to pay at the time. In Tanner v. Smart the main question was, whether an acknowledgment of debt was sufficient without a promise to pay. Lord Tenterden says (p. 609), "Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why shall not the rule expressum facit cessare tacitum apply?" But no such expression is found in this case, unless the words above stated, or those respecting payment 'on the first convenient opportunity' have that force. He also mentioned Whippy and another v. Hillary (b).

Jervis and Whateley in support of the rule. The court will not suffer the material fact of date to be imported by oral evidence into the letter relied on by the plaintiff as an acknowledgment. Nor is that letter ex vi terminorum applicable to the particular debt — sought to be recovered. On proceeding to argue the second point, they were stopped by the court.

BAYLEY B. (c).—The defendant's words in his letter

⁽a) 6 B. & C. 603.

⁽b) 3 B. & Adol, 399.

⁽c) Lord Lyndhurst C. B. was sitting in equity.

Edmunds v. Downes.

to the plaintiff, "I shall be most happy to pay you both interest and principal as soon as convenient," sppear to us to imply that it was not convenient to the defendant to pay at the then present time. We are therefore of opinion, that some evidence should have been given by the plaintiff that the time of such convenience had arrived, and perhaps that some settlement between the parties had taken place; for in a subsequent part of his letter the defendant says, "I shall pay no more interest until we have a fair settling." The same settling is pointed at in his letter of 1st April 1832. We do not give any express opinion on the first point, though we should not have made this rule absolute on the second, had we not thought it at least doubtful whether the date of the written acknowledgment could be supplied by oral evidence. present opinion however is, that the first letter put in does contain as much on the face of it as by 9 Geo. 4. c. 14. was necessary to be expressed in writing. Kennett v. Milbank was cited in Lechmere v. Fletcher (a); but this court was of opinion with Lord Tenterden in the subsequent case of Dickinson v. Hatfield (b), that a the act did not require the amount of the debt to be specified in the written acknowledgment of it, that fact might be supplied by extrinsic evidence.

Rule absolute on the second point.

(a) 8 Bingh. 38.

(b) 2 Mood. & M. 141.

1834.

TABRAM, Gent. one &c., against Fri

A person in insolvent circumstances agreed with an attorney, who was one of his creditors and held a cognovit for his debt, to procure and conduct his discharge under the insolvent debtors' act, and that the omitted from the schedule, and the operation of the cognovit suspended till after the discharge had taken place, when it was to be revived. After the party's disment was entered up and execution issued. The aside with costs.

KELLY had obtained a rule calling on to show cause why the judgment entere the defendant on a cognovit, and the exec thereon, should not be set aside for irreg The defendant being indebted to among others, employed him as an atto insolvent debtors' court to procure and discharge therein; but it was stipulated b that the debt then due to the plaintiff omitted from the schedule, and that the of cognovit then held by him for the am debt should be be suspended until after the defendant sh charged, but should be revived immediate The defendant was afterwards event. and the plaintiff's bill for obtaining that di satisfied. In a short time after, the plaintif the judgment and issued the execution no be set aside

Follett showed cause. To support this charge, a judg- must be proof of actual fraud committed k tiff; Howard v. Bartolozzi (a). The omi plaintiff's debt was no fraud on the insolv court set them court, for no creditor is bound to come in. fraud on the other creditors who by su obtained a larger present share of the effects. In Jackson v. Davison (b), and (White(c), which will be cited on the oth plaintiffs had been opposing creditors. were so distinguished by Denman C. J. an in Howard v. Bartolozzi. If the body of c

⁽a) 4 B. & Adol. 555.

⁽c) 3 B. A

⁽b) 4 B, & Ald. 691.

unaffected, and the parties are the only person's interested in omitting the name and debt from the schedule, there seems no objection to so doing. Again, in Howard v. Bartolozzi, it was not considered a fraud on the general policy of the insolvent law that an attorney employed by a party about to take the benefit of an insolvent act should omit from the schedule a debt due to himself, and sue the party for it after her discharge (a). In Baker v. Sydee (b) the defendant, at the time of becoming insolvent, disputed the plaintiff's right to recover in the action, and did not include him in his notice or schedule. The court of C. P. held. that the notice was only notice to the creditors named in the schedule and notice, and that his discharge was against the demands of such creditors only. decision took place on 53 Geo. 3. c. 102. s. 32., with which 7 Geo. 4. c. 57. s. 61. in substance corresponds. By section 46 of the latter act, the insolvent court is to adjudge that the prisoner be discharged and entitled to the benefit of the act "as to the several debts and sums of money due or claimed to be due at the filing the prisoner's petition from such prisoner to the several persons named in the schedule as creditors, or claiming to be creditors for the same respectively" &c. shows that a creditor who does not come in under the insolvent act is not bound by it, and that an action is mintainable against an insolvent after his discharge, if the cause of action is not contained in his schedule.

TABRAM v.
FREEMAN.

Kelly contrà. The agreement sought to be enforced in this action is a fraud on the insolvent court, on the other creditors, and on the policy of the insolvent law. First, the plaintiff, who, being a creditor of defendant,

⁽a) At the time of that decision it was doubtful on the evidence whether Henerd had wilfully, fraudulently, and in breach of his duty to the defendant, concealed his debt or prevented her from inserting it in her schedule.

⁽b) 7 Taunt. 179.



was employed as his attorney to procure his discharge, must be taken to have prepared the schedule and purposely to have omitted his own debt. The effect of the agreement was, that the insolvent should consent to a false schedule being made, and so deceive the insolvent court. For by 7 G. 4. c. 57. s. 40., the debtor is to deliver in on oath a schedule containing "a full and true description of all debts due or growing due from such prisoner at the time of filing his petition, and of all and every person and persons to whom such prisoner shall be indebted, or who to his or her knowledge shall claim to be his or her creditors, together with the nature and amount of such debts and claims respectively." And by section 43. at the hearing the matters of such petition and schedule, the court is to examine into the matters thereof upon the oath of such prisoner, and of such parties and other witnesses as they shall think fit to examine. Neither of these sections were brought before the court in Howard v. Bartolozzi. Next, the creditors are defrauded; for by section 57. means are pointed out by which the assignee may obtain execution to issue in order to distribute the insolvent's after-acquired property among his creditors: but if a single creditor can by such an agreement as this withhold his debt from the schedule, and immediately after the discharge enter up judgment on a cognovit previously given, he may gain a priority of execution so as to pay his whole debt with the debtor's afteracquired property, to the prejudice of the other creditors. Lastly, it is a clear fraud on the policy of the law which intended the complete discharge of the debtor's person from all his debts previously contracted, and the application of all his effects future as well as present to the rateable payment of them.

BAYLEY B .- I am of opinion that this judgment and

execution should not be permitted to stand. When Tabram was employed to obtain the defendant's discharge, it became his duty to state in his schedule all the defendant's debts, including that owing to himself, according to section 40. The effect of so doing might be to call into operation the opposition of every creditor against whom the discharge to be subsequently obtained would operate, and to exonerate the estate from the claims of any person who might have come in and claimed for a debt incurred previously to the insolvent's discharge. The plaintiff, by agreeing that schedule omitting his own debt should be delivered in under the statute, agreed in fact that the insolvent should deceive the insolvent court by a wilfully false statement on oath, contrary to sections 43 and 71 of the insolvent debtors' act. This would alone be sufscient to avoid the agreement; but the creditors are also imposed on. They have a right to believe that the debtor is set free, and that by his future exertions he may procure the means of supporting biaself and satisfying their just claims. How can he do this if his person and his property are liable to an execution whenever after his discharge the plaintiff may find it advantageous to come upon him? The true scope and object of the statute appears to have been but partially considered in the case of Howard v. Bartolozzi. Its intent was, that insolvents should lay before their creditors and the court a fair and true statement of their affairs, in order that where they have been guilty of no misconduct their persons should be discharged and their property divided among their creditors; and that when discharged they should be unincumbered with prior obligations and free to seek their livelihood, subject to the right of the creditors to their future surplus money. All these objects might be defeated if agreements like the present could be 1834.

TABRAM

T.

FREEMAN.

TABRAM
v.
FREEMAN.

supported in law. The rule for setting aside the judg ment and execution must be made absolute with costs which will leave the plaintiff at liberty to try the question in an action, and carry it into a court of error, if be thinks fit.

VAUGHAN B.—Considering sections 40, 60, and 6 together, this affair appears very like a fraud on the in solvent act. Section 63 provides, that where amount are erroneously stated in schedules without fraud, creditors and insolvents may enjoy the benefit of the act notwithstanding; but the act is wholly silent as to the total exclusion of a particular debt by preconcert of otherwise. It has been shown how such an agreemen as this would affect the rights of the other creditors.

Bolland B.—Suppose an insolvent to set forth debts to a trifling amount on his schedule, he migh again obtain credit and goods on the ground of being cleared of all his debts. But if an old creditor can be permitted to keep back his debt to a large amount, he might sweep away the goods thus obtained on new credit.

Gurney B.—The directions of section 40 are precise. Now as the plaintiff was employed by the insolvent at the attorney to procure his discharge, he must be responsible for the contents of the schedule, and the omissions from it. Section 32 prevents voluntary assignments of property by insolvents to their creditors within three months before the insolvent's imprisonment. This agreement having been contrived by the plaintiff cannot be enforced by him for his own benefit. It is a fraud on the law, the court, and the creditors, and an oppression on the debtor.

Rule absolute for setting aside the judgment and execution with costs.

1834.

DOE on the demises of J. H. HARRIES, W. EDWARDES, C. Tucker, and J. Symmons, against Morse.

FJECTMENT for a farm called St. Dogwell's in By a leasing Pembrokeshire. At the trial before Patteson J. power in a at the spring assizes for that county in 1833, the ques- tlement, dated tion was as to the validity of a lease granted by 1777, power J. O. Edwardes, the father of one of the lessors of the was reserved plaintiff, under the leasing power, in the following set- in actual postlement.

By indentures of lease and release of 4th and 5th limitations, to August 1777, the release made between Rowland Ed- lease any part of the lands wardes the elder and Ann his wife, of the first part; thereby settled J. O. Edwardes eldest son and heir at law of the said ment "for one, R.E. of the second part; W. Ford and J. Harries of two, or three the third part; J. Symmons and G. Harries esqrs. of any term or the fourth part; and Catherine Tucker, spinster, of the number of fifth part. After reciting that a marriage was intended ceeding 21, so to be solemnized between the said J. O. Edwardes and as upon all and every such Catherine Tucker, and that by certain conveyances the lease or leases and hereditaments thereinafter described were there should be reserved and thereby limited, in default of a certain appointment, to continued paythe use of the said R. E. for life, and of the said respective con-J.O. E. his heirs and assigns for ever, it was wit- tinuance of nessed, that in consideration of the said intended leases, by half-

marriage setto the persons virtue of its such lease and yearly payments, the best

and most improved yearly rents that could be reasonably had or obtained, without taking say sum or sums of money or other thing by way of fine or income for the same."

By lease of 11th January 1783, the tenant for life of the settled property (one of the creators of the power) demised a part of it to hold from the 4th January preceding for three lives, reddendum the yearly rent or sum of 31L 10s., at or upon the two most usual feasts or days of payment in the year, viz., the feast of St. Philip and St. James the Apostles (1st May,) and St. Michael the Archangel (29th September,) by even and equal portions; the first payment to be made on the feast of St. Philip and St. James the Apostles, next ensuing the date of the lease : Held, first, that the lease was void, the power not having been duly executed by reserving the rent at half-yearly periods;—secondly, that old leases of other lands in the neighbourhood were not admissible to show the above feast days to be the usual half-yearly days of payment in that part of the country.

Doe v.
HARRIES and Others.

marriage, they the said R.E., A. his wife, and J. O. E., did grant, bargain, sell, alien, remise, release and confirm, limit and appoint, unto the said W. Ford and J. Harries, and their heirs and assigns (inter alia) the premises in question, situate &c., and then or there late in the tenure or occupation of M. Adam, to hold the same unto and to the use of the said W. Ford and J. Harries, their heirs and assigns, for ever. the use of the said R. E. party thereto, and his heirs, until the solemnization of the said intended marriage; and from and after the solemnization of the same, to the use of the said R. E. party thereto, for and during the term of his natural life. Remainder to the use of the said J. O. E. and his assigns, for and during the term of his natural life; remainder to the use of the said W. Ford and J. Harries and their heirs, during the lives of the said R. Edwardes and J. O. E, upon trust to preserve contingent remainders; remainders to the use of J. Symmons and G. Harries (a), their executors, administrators and assigns, for 500 years from thence next ensuing, upon the trusts thereinafter expressed; remainder to the use of the first son of the marriage, and the heirs of the body of such first son lawfully issuing, with divers remainders over. Proviso that it should and might be lawful for all and every the person and persons being in the actual possession of all or any part or parts of the said premises thereby granted and released and appointed by virtue of the limitations aforesaid, by any deed or deeds indented under their hands and seals respectively to be executed from time to time, to make any lease and leases in possession and not in reversion or remainder, or by way of future interest, of all or any of the same premises, or of any part or parts thereof whereof such person should

⁽a) J. Symmons survived G. Harries, and J. H. Harries, the lessor of the plaintiff, was heir of J. Harries, who survived W. Ford.

be in possession, unto any person or persons, for one, two, or three life and lives, or any term or number of years not exceeding 21 years, so as such lease or leases, by any express words therein to be contained, be made not dispunishable of waste; and so as upon all and every such lease and leases there should be reserved and continued payable, during the respective continuance of such lease and leases, by half-yearly payments, the best and most improved yearly rents that could be reasonably had or obtained, without taking any sum or sums of money or other thing by way of fine or income for the same. And so as in every such lease there should be contained a clause of re-entry for non-payment of the rent and rents to be thereby reserved: and so as the lessee or lessees to whom such leases should be made as soresaid, should seal and deliver a counterpart or counterparts of such lease and leases respectively, to be made as aforesaid.

The marriage took place shortly after the settlement, and R. Edwardes soon afterwards died, leaving the said J. O. Edwardes him surviving. By indenture of 11th January 1783, between the said J. O. Edwardes of the one part, and M. Adams of the other part, it was witnessed, that the said J. O. Edwardes, for and in consideration of the surrender of a former lease theretofore granted on the premises thereinafter demised; and also for and in consideration of the rents, ovenants, and agreements thereinafter reserved and contained, which, on the part of the said M. Adams, his heirs and assigns, were to be paid, performed, and kept; and for divers other good causes and valuable considerations him the said J. O. Edwardes thereunto especially moving, did demise, grant, set, and to farm let unto the said Morris, his heirs and assigns, the premises in question, then in the occupation of him the uid M. Adams, his undertenants and assigns; together Doe v.
HARRIES and Others.

Doe v.
HARRIES and Others.

with all houses &c. (in as large and ample a manner as R. Adams, father of the said M. Adams, and his undertenants, formerly held and enjoyed the same,) except all mines, &c: to hold the said premises with the appurtenances, except as aforesaid, unto the said M. Adams, his heirs and assigns, from the 4th day of January then instant, for and during the natural lives of E. A., J. A. and A. Adams, daughters of the said M. Adams and M. his wife, and for and during the natural life of the survivor or longest liver of them; yielding and paying therefore yearly and every year, during the said term, unto the said J. O. Edwardes, his heirs and assigns, the yearly rent or sum of 311. 10s., at or upon the two most usual feasts or days of payment in the year, (that is to say) the feast of St. Phillip and Jacob the Apostles (a), and St. Michael the Archangel (b), by even and equal portions, the first of such payments to begin and be made on the feast of St. Philip and Jacob the Apostles next ensuing the date thereof. And also five couple of young fat hens at Shrovetide yearly, and carrying or causing to be carried three cart-loads of coal or culm from the coal or culm pits to the dwelling-house of either Hook or Sealeyham yearly; and also grinding and doing suit with all his and their and every of their corn, grist, grain and malt, at the first mill, called Treffgarne mill, during the said term, and keeping one dog, either hound, greyhound, or spaniel, in good sporting order for the said J. O. Edwardes, his heirs and assigns. And also paying and discharging yearly, during the said term, the chief rent called the Bishop's rent for the said premises. Then followed covenants for the above objects as stated in the reddendum, with a proviso of re-entry in case the said rent should be unpaid by the space of 21 days next after either of the said days of payment whereon the same

⁽a) May 1st.

⁽b) September 29th.

ought to be paid as aforesaid being lawfully demanded, and no sufficient distress or distresses to be had or found on the said demised premises to satisfy the same, together with all arrears thereof, if any, or non-performance of the costs and agreements therein contained. The lessor J. O. Edwardes died in July 1825, leaving W. E. Tucker a lessor of the plaintiff, his heir at law, as eldest son of the marriage, him surviving. The defendant was assignee of the lease. For the lessors of the plaintiff it was contended that the lease was void, for the following reasons:

- 1. The power having required the reservation of the best yearly rent by half-yearly payments, without taking any sum or other thing by way of fine or income, the lease took effect from the 4th January preceding its date, and fixed the first payment of rent for 1st May, a period of four months only, and the second for 29th September, another period of about five months only. The lease reserved the rent not by half-yearly payments as in the power, but by payments on 1st May and 29th September in each year, which are not half years. The first payment of rent reserved to be made on 1st May 1783, within six months, made it a forehand rent, and tantamount to taking a fine.
- 2. That if the duties and customs were reservations of rent, they should have been reserved half-yearly; and that if they are not reservations of rent, they are in the nature of a fine or income, and contrary to the power which directed the best yearly rent to be reserved.
- 3. That the clause of re-entry should have been immediate on non-payment of the rent or non-performance of the covenants, without postponing the period, or being clogged with any condition as to sufficient distress on the premises (a).

Doe v.
HARRIES and Others.

⁽a) See 2 Br. & B. 524.

Doe v.
HARRIES and Others.

For the defendant it was answered, 1st, that the power did not require equal half-yearly payments of rent, but that yearly rent should be reserved during the continuance of a lease by half-yearly payments. That what are to be considered days for half-yearly payments of rent depends in every case upon usage, the intervals between every usual day, as Lady-day and Michaelmas, Christmas and Midsummer, being different. That evidence was therefore admissible, to shew the 1st May and 29th Sept. to be the most usual half-yearly rentdays in that neighbourhood and to be so described in Leases of lands of other deceased persons in various parts of Pembrokeshire, dated about the same period as the leases in question, and in which these days were fixed for payment of rent, were tendered to shew the usage. 2d. That the duties were neither reservations of rent nor fines. 3d. That the condition of reentry, being in the terms usually adopted and reasonable in itself, satisfied the general wording of the power.

The learned judge held that proof of any usage in the neighbourhood by which rents were reserved payable on the days in question might be received, and cited Smith and another v. Wilson(a); but held that the leases offered in evidence for that purpose were inadmissible. He inclined to think that the reservation of rent on two known feast days might be considered a half-yearly reservation within the power, and that Doe d. Lord Shrewsbury v. Wilson(b) was in point for the defendant, on the objection that the first rent being made payable at a day within the first six months was therefore a forehand rent. Also, that the reservation of the fowls was not a "fine," and that the clause of re-entry was good,

the words of the power being general, Doe d. Jersey v. Smith(a); and lastly, that the lease was a due execution of the power. He accordingly nonsuited, giving leave to move on all the points to enter a verdict for the lessors of the plaintiff. A rule was accordingly obtained in Easter term.

Doe v.
HARRIES and Others.

J. Wilson, J. Evans and E. V. Williams showed cause in Trinity term. The validity of this lease depends on whether or not it is a defective execution of the leasing power. It may be briefly premised, that the doctrine of giving a stricter interpretation to such powers than to any other (b) is long exploded, and that it is held that being for the benefit of all parties to the estate and a common modification of property in land, they are to be literally construed and carried into effect according to the intention of their authors (c). first and main objection to the lease is, that whereas by the terms of the power the rent is to be payable by halfyearly payments, it is in fact made payable by the lease at two intervals, the one less, the other more than half a year. The parties creating the power cannot be taken b have intended a literal performance of this direction, wa year cannot be divided into an equal number of days(d). In Harrington v. Wise(e), the lease was for years, rendering rent at the "two usual feasts del an" which the court held to be Michaelmas and Lady-

⁽e) 5 B. & Ald. 363. (b) See id.; 2 Br. & B. 473; Doug. 565. (c) Feet v. Marriott and others; MS. Rep. Pasch. 13 Geo. in Canc. 3 Vin.

Ab. 451; 1 Burr. 121; 3 Cha. R. 73. See Shannon v. Bradstreet, 1 Sch. & Left. 52. cor. Lord Redesdale; Right v. Thomas, 3 Burr. 1446; Goodtille v. Famucan, Doug. 573; and Bla. R. 440; Pomeroy v. Partington, 3 T. R. 675; see also the Jersey case, 1 Br. & B. 97; 2 id. 472; and Sugden on Powers, 5th edit. 587, 583.

⁽d) See Co. Lit. 135 b.

⁽c) 2 Roll. Abr. 460, tit. Reservation, M. pl. 2.



day'a), but it could only be by usage that payments of rent on those days could be considered half-yearly payments, as neither interval amounts precisely to half a year; thus the period between Michaelmas and Ladyday contains 177 days, and that between Lady-day and Michaelmas, 188. Again, the interval between Christmas and Midsummer contains 181 days, and between Midsummer and Christmas, 184; yet they are commonly called half years, and rents are reserved accordingly. Nor does the payment of half-yearly dividends approach more closely to the 182 days mentioned by Coke as half a year(b). But E. O. Edwardes, in creating the power, considered 1st May and 29th September to be the days usual for payment of half-yearly rents, and if so, the inaccurate effect must be given to his opinion. The lease in question, being subsequently. granted by him, best proves the sense in which he had used "half-yearly" in the power. [Lord Lyndhurst. Can the construction put on a power by the author of it in a subsequent lease be taken to illustrate its meaning?] Had the lease reserved rent "at the two most. usual feast days," that would have been sufficient within the power; and which days they are depends on the

⁽a) May-day and Martinmas were said to be usual balf-year days in the north; Candlemas, 2d February, and Lammas, 1st August, were mentioned by Lord Lyndhurst as more closely corresponding in the length of the intervening periods.

⁽b) As to the tempus semestre, see Cateaby's case, 6 Rep. 61; Cro. Jac. 167. Lord Coke says, Co. Lit. 135 b., A quarter of a year containeth by legal computation ninety-one days, and half a year containeth 182 days; (six. the solar year, Bract. 359,) for the odd hours (vis. the six hours over the 365 days in each year which is the minor year, vis. not the bissextile or leap-year consisting of 366 days) in legal computation are rejected, and by the statute, de anno bissextili, 21 Hen. S. it is provided qued computation dies ille excrescens et dies proximè precedens pro unico die, so as in computation that day excrescent is not accounted. The first six calendar months of the year includes February and contain 180 days only, the other six 184 days.

custom of the country. Extrinsic circumstances, as the intent to use a word in a sense different from its usual or correct acceptation, may be considered in construing a power(a). The meaning of "half-yearly" as here relied on, in opposition to the lease, is, to use Sir Thomas Plumer's words in Cholmondeley v. Clinton (b), "an imported meaning, not the result of the words themselves but of superadded inference. The additional idea suggested by inference, originates not with the writer but his expositor, and being collected extrinsically by conjecture, may by extrinsic circumstances be rebutted. Take a familiar instance in the construction of the words 'the true religion;' the expositor interprets them to mean the christian religion, but would he persevere in that construction when he discovered the words to have come from a Mahommedan? Do the words change their meaning when that circumstance is discovered? No; but the erroneous inference of the expositor does; and so it in the present case." Here the term "half-yearly" being equivocal, not admitting of a strict or arithmetical extrinsic evidence, e. g. usage, must be let to explain it (c). In Smith and another v. Wilson (d), ted by the learned judge at the trial, the lessee of a warren had covenanted that at the expiration of the he would leave on the warren 10,000 rabbits, the Passor paying for them 60l. a thousand, and in an action gainst the lessor for refusing to pay for the rabbits left at the end of the term, parol evidence was held admismable to shew that by the custom of the country where the warren was, the word "thousand," as applied to rab-Voits, denoted 100 dozen or 1200 rabbits. Arithmetical construction being out of the question in this case, the resonable construction is more necessary, viz. that the

DOE v.
HARRIES and Others.

⁽a) See 2 Jac. & W. 91-93. (b) Id. 121.

⁽t) See Doe v. Meyrick, ante, Vol. III. 901, 902.

^{(4) 3} B. & Adol. 728.



power is satisfied by there being two equal payments in the year at reasonable intervals, the most cogent evidence that they are reasonable, being the usage of the country where the land was. In Cowdrey's case (a), a party seised of lands devised to R. C. "60s. of yearly rent growing out of all his lands in H." with a claim of distress for non-payment thereof "at the usual feasts" during his life. The usual feasts in these vills were St. Michael and the Annunciation (viz. Lady-day), and the rent being in arrear at the feast of St. Michael the devisee distrained and held good, for the usual days shall be taken to be the usual days for payment of rent in the place where the lands were. Then the ancient leases of other estates in the neighbourhood, stating the days in question to be the usual and accustomed days of payment, should have been received in evidence. [Lord Lyndhurst. In the case cited, evidence was clearly admissible to explain the word "usual," but have the words "yearly" or "half-yearly" such a patent ambiguity as would entitle you to explain them by evidence extrinsic to the deed? Leases of other estates in the county were res inter alios, and therefore not admissible.] It is clear that M. Adams was in possession by a former lease, and it may be inferred that the rents were therein reserved on the same days. In Cholmondeley v. Clinton, it being shown by the deed of 1781, that Lord Orford knew himself to be the right heir of Samuel Rolle at the time he settled the estates in question to the use of himself for life, and from and after his decease, in default of heirs of his body or other appointment by himself, to the use of the right heirs of Samuel Rolle for ever; Mr. Justice Bayley and Sir -Thomas Plumer Master of the Rolls came to the conclusion that he intended by those words Mr. Trefusian the right heir of S. Rolle at his own, Lord Orford Doe v.
HARRIES and Others.

gotten for the same, without taking any sum or sum of money, or other thing, for or in lieu of a fine or in come for the same. By lease, dated 15th October 1800 the tenant for life let the premises for fourteen years, \$ be computed, as to the meadow and plough-land, from 13th February then last, as to the pasture lands from 25th March, also then last, and the messuage &c, from the 12th May then last, at a yearly rent, payable to the lessor and such other person as for the time being should be entitled to the freehold and inheritance, by half-yearly payments on 11th November and 25th March "the first payment to be made on 11th November nex ensuing." And it was held, that the reservation of the first half-year's rent for an enjoyment of only twenty seven days was not taking a sum of money for a fine being a compensation taken in consideration of an occu pation antecedent to the date of the lease. And Lore Ellenborough said, " how is that (the reservation of the first half-year's rent) a breach of the condition? is i taking a sum or sums of money for or in lieu of a fine! it is at the utmost but granting a lease with a covenan for payment of the first half-year's rent before the hal year has expired. It is then at the utmost only taking a covenant which may be the means of possibly acquiring to him a sum of money. Then it is not within the letter, but is it within the spirit? The power says, ' for or in lieu of a fine or income for the same;' is this for a in lieu of a fine or income? What fine did the parts contemplate? The reservation appears to be in consideration of an antecedent occupation. It is not in lieu of a fine if a party take a compensation for a time antecedent to the date of the lease, during which time the lessee has been permitted to occupy, and consider ing the lease as if it were executed at the time of the commencement of the occupation." [Lord Lyndhurs C. B. There was no evidence to show how that M

Dor v. Harries

and Others.

ims held under the surrendered lease. If under : lease the rent was reserved payable at the same t days, the rent would be running on; and it might baps be presumed that they were alike in both es.] In Doe d. Shrewsbury v. Wilson(a), power created by a private act of 1720, to lease for three s or twenty-one years, or any term of years deterable on three lives, " so as upon all and every such se and leases there be reserved and made payable rly, during the continuance thereof, the usual and ustomed yearly rents, boons and services." The se bore date 6th January 1785, reciting the surder of a prior lease of the premises, and was for ety-nine years, if three persons therein named should long live, at a yearly rent payable at Lady-day and ichaelmas, the first payment to be made on 25th arch 1785. A prior lease of the premises was in idence dated 2d February 1708, with similar reservams of rent. It was objected that a half-year's rent wing been reserved for the interval between 6th waary and 25th March 1785, that was a forehand nt in fraud of the power, but the Court held it a usual and accustomed rent" within the power. Doe Giffard (b) will be relied on for the other side, but e lease was there for twenty-one years, dated 14th ptember 1809, and reserved a rent payable by even df-yearly payments on 29th September and 25th larch, the first payment to be made on 25th March en next. But the lease appears to have been held ed, on the ground, that as the last year of the term rould end on the 14th September no rent would be syable at all after Lady-day of that year. The lease n that case, as well as Doe v. Wilson, being for a term

⁽a) 5 B. & Ald. 363.

⁽b) At Nisi Prius, before Lord Ellenborough, 1810. Cited arguends in Dec v. Wilson, 5 B. & Ald. 371.



of years certain, the remainder-man could in no case be benefited, but must receive injury. Whereas in this, which is a lease for lives, the termination must inevitably be uncertain, and the remainder-man may be a gainer(s). The dictum of Powell J. in Regina v. Weston(b), to which Holt C. J. agreed, is contrary to Doe v. Giffard. Tomkins v. Pynsent(c) shows that the words "if the feast of St. Philip and St. James, and St. Michael the Archangel" are not the usual half-yearly feasts, they might be rejected as repugnant even out of the instrument itself. [Bayley B. There the repugnancy was clear on the face of the instrument itself, the reddendame being by quarterly payments, and only three quarter days being afterwards named (d).]

Chilton and Whitcombe in support of the rule (s).

(a) See Sugden on Powers, 5th edit. 630.

(b) Lord Raym. 1198.

(c) Id. 819.

(d) No judgment was given on the other points which were thus argued. For the defendants it was said, that if the money rent is the best and most improved yearly rent, and reserved at the proper half-yearly intervals, it is immaterial on what days the superfluous reservations are made to accrue. It will be said, that if these duties and services had not been reserved, the most would have been so much larger; but in estimating whether a rent reserved fifty years ago was the best at that time, the scales will not be very nicely adjusted, and in the absence of all proof fraud it will be taken to be a bond fide reservation at the time; Doe v. Radeliff, 10 East, 278. It does not appear whether lessor or lessee was liable to pay the bishop's rent, and the construction must be in favour of the lease ut res magis valent quan proof. Doe d. Jersey v. Smith, 2 Br. & B. 590—596, shows the clause of re-entry to be within the power.

For the lessor of the plaintiff it was contended, that if the other reservations of services &c. to be rendered were to be taken as part of the rest, then the whole rent was not reserved by half-yearly payments according to the power; if they were not, a better pecuniary rent might have been obtained had they not existed. Several of them, as carrying the culm, keeping the dog, &c. might be of no possible benefit to the remainder-man. On the last point Cor v. Day, 13 East, 118, applies, and is not overruled by Doe d. Jersey v. Smith, 2 Br. & B. 472.

(e) Whitcombe was heard in Michaelmas term 1833.





there being no reference to usage in this power. On the other hand, it contains an unambiguous direction to reserve the rent by half-yearly payments, dehors which the court cannot look. Notice might have been given to produce the former lease so as to let in evidence of the days at which rent had been there reserved. In 2 Rolle's Abridgment, tit. Reservation, M. pl. 3. is this dictum of Coke: "If a man lease land on the 1st of May, or at another time, payable quarterly, this shall be understood quarterly from the making of the lease and at the usual feasts. If, under the present power, the lease had reserved rent payable at Midsummer and Michaelmas, styling them the two most usual feast days for payment of rent in the year, those might equally be called half-yearly payments. The settlor's intention must rule, but can only be gathered from the power and not from his subsequent declarations (e.g. recitals in leases) in enlargement of his power. Though the termination of a freehold less may involve more contingencies than a lease for year, e. g. the deaths of cestui que vie and the lessee, it is only a difference in amount; the loss or benefit to the reversioner or tenant for life on the falling in of a least for years being uncertain. A notice served on 1st Mer to quit on 29th September could not be good, though & notice on 29th September to quit on 25th March is; Doe v. Green (a), Doe v. Kightley (b).

The second question is, whether the reservation of the first rent to be paid at the end of four months is a forehand rent? If it is not, still the best rent is not reserved. In Doe v. Giffard the power required the "best and most improved yearly rent" to be reserved; but the lease was for 21 years, dated 14th September, and reserved the first half-yearly rent to be paid on 29th September, the 15th day after its date. It was

DOE v.
HARRIES and Others.

man of any portion of his interest." But in this the remainder-man may be injured; for in case of death of the tenant for life on the 30th Septem there may be a long occupation after the remain man's title accrues without any rent paid. tenant for life died on 2d May or 30th September would have secured to himself, in the first case, ha year's rent for about four months' occupation; in second, the whole year's rent for about nine mos It is true that if tenant for life died on 30th Apri 28th September, the remainder-man would have same advantages as to the rent; and if the tenant life died on 30th April, and the cestui que vie 80th September, the remainder-man would have land to the 4th January, and the whole year's rent about five months' title. Again, if tenant for life d on 80th September, and the last cestui que vie 4th January, the remainder-man would receive no ! for those months. But the tenant for life cannot game with the rights of the remote remainder-man, duty is not to put him in jeopardy of getting less ! than he himself receives. Lord Eldon, in the case of Queensbury leases (a), said, "There is but one crites which our courts always attend to as the leading on discussing the question, whether the best rent been got or not, that is, whether the man who made the lease has got as much for others as he for himself; for if he has got more for himself then others, that is decisive evidence against him." [L Lyndhurst C. B. Should not the lease have made first half-year's rent payable at the end of the half v from its commencement? If not, it might be reser payable at the end of the third day. This is a per to lease for life or years; the same construction m therefore be given to either description of lease, I

⁽a) 5 Dow. 344; Sugden on Powers, 5th ed. 612.

not only not found that the days on which the rent was reserved are the usual half-yearly days of payment, but every presumption is that they are not. The terms of the lease must be read in their common acceptation. Bayley B. Is it fair that a tenant for life should secure a year's rent by a nine months' occupation?]

Doe v.
HARRIES and Others.

Lord LYNDHURST C. B. (a)—It appears to me that this power has not been properly executed. terms the tenant for life had a right to grant leases, reserving rent payable half-yearly; but the lease granted by him reserves rent not payable half-yearly, but at intervals very distinguishable from half-yearly periods. It has been argued that it is impossible to divide the year correctly into terms of payment strictly half-yearly, and that the power must therefore be taken to mean the unal half-yearly days of payment. I admit that if it had appeared that the days of payment here reserved were the days of "half-yearly payments" according to the usual acceptation of those words, and corresponding with each other accordingly, such reservations as those contained in the lease would be good within the power. But there is no such evidence here, and the leases offered that purpose were inadmissible. The power then not buting been executed in the terms of it, the lease is bad. The rights of the remainder-man might be seriously injuted by it. Had this been the case of a lease for years, it would have been precisely within Doe v. Giffard; and I me not aware that that case has been overruled or enterched in Doe v. Wilson. On the contrary, all the judges carefully distinguished the facts of that case It has been, however, argued, that as the Present is a freehold lease, it is on that ground dis-

⁽e) This judgment was delivered in Michaelmas term 1833. An accident respecting the papers prevented the insertion of this and a few other cases in the reports of that term.



tinguishable from Doe v. Giffard; but as the injury to the reversioner may be as great in one case as the other, there is no difference between them in principle. If the remainder-man's title accrued by the death of the tenant for life on the 1st October, and the last cestrique vie died on 3d January, he would have lost all the rent accruing between those periods. As we are of opinion that the lease is for the above reasons an improper execution of the power, it is unnecessary to state any opinion on the other points which have been raised.

BAYLEY B.—I should have been glad if this lesse could have been supported consistently with the term of the power, but I am clearly of opinion that it cannot. Even if we should hold that the power is not to be strictly complied with, we must at least see whether is requisites are substantially satisfied by the lease. By the lease the best and most improved yearly rent is to be reserved by half-yearly payments. That direction requires a division of the rent as nearly as may be two equal half-yearly payments, and, as it seems to m, that the last of those payments should be made at the conclusion of the year. I do not say that if the usage of a country throws more days into one half year than the other, it would be a deviation from the power to reserve the yearly rent on those half-yearly days; but there is in this case a division of the year into 151 and 214 days. That is a material difference; neither do the dayscorrespond or are they esteemed usual half-yearly days for payment of rent. In cases of this kind the court looks to the intention of the settlor and what in fair between the tenant for life who executes the power. and the reversioner. It is plain that the tenant for life should not reserve to himself an advantage unfair as against the reversioner; and that if he does so deviate

their respective debts," and "to procure Cullimore to become his surety for the sum of 10621. 8s. 6d. part of is said debts," and then proceeded thus:—

CONSTABLE and Another v.

"Now the said J. Andrew doth hereby agree to pay ad satisfy the several persons parties hereto of the hird part, the said sum of 15s. in the pound on their espective debts and costs in manner following, that is say, 7s. 6d. in the pound on the 14th day of January stant, and the further sum of 7s. 6d. in the pound on be 4th day of May next, and in consideration of the aid several creditors of the said J. Andrew agreeing s hereinafter mentioned, to discharge him from the nyment of all debts and demands whatsoever due from in on the 19th day of November last, on receiving the mid 15s. in the pound at the times and in manner aforewid; and also to relinquish all claim and demand on the mid J. Andrew, his estate or effects, under the bebre-mentioned agreement; he the said J. Cullimore doth bereby agree to pay unto H. Ellis and Messrs. W. and C. Constable, three of the said creditors of the said J. Andrew, the sum of 5311. 5s. 3d. on the 14th day of January instant, in part payment of the first instalment of 7s. 6d. in the pound, to be divided by the said W. and C. Constable and the said H. Ellis among the said reditors of the said J. Andrew, in proportion to their espective debts; and for the consideration aforesaid, the aid J. Cullimore hath this day accepted one bill of exhange, dated the 1st January last, amounting to a like um of 5311. 5s. 3d., drawn by the said J. Andrew in brour of Messrs. W. and C. Constable, two of the reditors of the said J. Andrew, payable on 4th May next, and in part payment of the said second instalment to be divided among the said creditors respectively as aforesaid when paid. And the several creditors, parties bereto, agree to exonerate and discharge the said J. Anther, on payment of the said 15s. in the pound as aforeCONSTABLE and Another v.

said, of and from all claims and demands whatsoever, up to the 15th November last, and to give him such release for their respective debts and demands as he may require. And it was agreed that the several bills of exchange, amounting together to 2711. 1s. 2d. which have been already duly indorsed by the said J. Andrew and handed over to the said W. and C. Constable, shall he considered as in part payment of the said 15s. in the pound. And the said H. Ellis hereby agrees, that when the said 15s. in the pound as aforesaid shall have been duly paid as aforesaid, he will deliver up to the said J. Andrew the lease of the house aforesaid which he now holds. And it is lastly agreed, that payment by the said J. Cullimore or J. Andrew of the said sum of 5311. 5s. 3d. into the bank of H. and Co., to the credit of the said H. Ellis, shall be a sufficient discharge for the amount and payment of the aforesaid bill of exchange, for the like sum to the said W. and C. Constable, shall in like manner be a discharge to them the said W. and C. Constable, without their being required to see to the application thereof."

The total debts were 1777l. 19s. 6d., of which the plaintiff's debt was 770l. The composition was in all 1333l. 9s. 8d. Cullimore having paid the two sums in part of it as agreed on, the residue of it consisted of the sum of 271l. 1s. 2d., the amount of the bills and note in the plaintiffs' hands, including the bill and note on which the action was brought. The acceptor of the bill and maker of the note having become insolvent, the present action was brought. The plaintiffs failed in proving the requisite notice of dishonour of the bill accepted by Chambers, and it was then contended for the defendant that the plaintiffs could not recover on the note, as by the agreement the defendant was discharged from all liability on the securities in the plaintiffs' hands, which (it was argued) were taken as absolute payment. Steiss-

irected a verdict for the plaintiffs for the of the promissory note, but gave leave to r a nonsuit. A rule having been obtained gly by Justice,

ger (Ball with him) showed cause. The queswhether, by the terms of this agreement for a ion, the bills deposited with the plaintiffs were ken absolutely as payment of their demand, or y way of collateral security, so as to give the a right to sue on them, if dishonoured. In and another v. Courtnay (b) it was held, that parol agreement for a composition did not constipulation that the creditors should give up s in their hands, a creditor who signed for the nount of his debt might retain the produce of awn by the debtor and accepted by a third which he held as a security for part of his debt, t of the agreement not being to extinguish the debt. In that case too there was an express that the creditors should release the debtors actions and demands on receiving a composition a the pound; which composition had been paid amount of the plaintiffs' demand, minus the



CONSTABLE and Another v.

the party would be thereby discharged of the remainde of them, and also that other creditors were similarly lured in to relinquish their further demands on the same supposition. But no deception was here practises on the surety Cullimore, who is a party to the agree ment, nor on the creditors; for the payment of these bills in full was part of the security and consideration for which all the creditors agreed to accept the comps sition, and benefitted them as well as the plaintiffs. was said, that these bills were to be taken as money between the creditors and the defendant, and the though the agreement states them to be indorsed and handed to the plaintiffs by the defendant himself, ye that the words "that they shall be considered as in part payment of the said 15s. in the pound," only leaw it open to the plaintiffs to sue the other parties to the bills. There is no express clause in this agreement to discharge the defendant from liability, but the partie agreed to exonerate and discharge the defendant of payment of the said 15s. in the pound. That payment was intended to be made by defendant at all events, and till it is made, his liability on the bills is kept up by the agreement. Further, the bill accepted by Cullimore was drawn by the defendant; so that if Cullimore had not paid it a remedy might remain against the defend. ant on it. The last clause recognizes the defendants liability.

J. Jerois (Justice with him) supported the rule. Had this action been brought by the plaintiffs, not for the benefit of the creditors but themselves, Steinman v. Magnus would have applied without being touched by Thomas v. Courtnay. But the latter case is not in point, because it was not against the debtor but agains a third party, his surety. Now the defendant here urges, that it was intended by this agreement that or

CONSTABLE and Another v.
Andrew.

payment of two sums of 5311. 5s. 3d., making 15s. in the pound, and on the defendants handing over the his and note to the plaintiffs he should be discharged from liability. Though there is no express stipulation for the defendant's discharge from liability on them, there is an express stipulation at the end, that payment of 5811. 5s. 3d. and of the bill accepted by Cultimore, that discharge him and the defendant. [Bayley B. They are not to be bound to see to the application of the money.] At all events the omission of such a provision as to the bills and note in the plaintiffs' hands, thows that the indorsing and handing them over to the plaintiffs was, as to the defendant, to be considered an absolute discharge. That must have been the impression of the surety.

BAYLEY B.—I entertain no doubt in this case, which turns entirely on the construction of this agreement. Its fair meaning is, that the bills and notes in the plain-**Ciffi hands shall, if paid aliunde, be considered as pay**went of so much of the defendant's debts as they amount to, but that the defendant should remain subject to all his habilities as indorser. The agreement is substanwilly this; Andrew proposes to pay his creditors 15s. in the pound on their respective debts, at two equal instalments, on the days mentioned. Then in consideration that the creditors will discharge him from all his debts, and will relinquish all demands on him under a previous agreement for which the present was substituted, the surety Cullimore agrees to pay the sum of 1811. 5e. 3d. in part payment of the first instalment, and scepts a bill for a like amount on account of the second; and the creditors agree to discharge and exonerate Anwere "on payment of the said 15s. in the pound." Now it was the undertaking of the parties that these bills note for 2711. 1s. 2d. should at all events be con-



sidered as money, and that the risk of default in paying them by the other parties should not attach on the defendant Andrew, but on the creditors at large, that would have been so material a condition that it would naturally have formed the subject of express stipulation. Then follows the clause on which the whole question arises. "And it is agreed that the several bills of exchange, amounting together to 2711. 1s. 2d., which have already been duly indorsed by the said J. Andrew and handed over to the said W. and C. Constable, shall be considered as in part payment of the said 15s. in the pound." Now if these bills and note were to be taken as money why was this clause introduced? To hold that they were to be considered as part payment "absolutely" appears to me inconsistent with the preceding terms of the agreement. It means, that if paid they should be part payment of the 15s. in the pound, and if not paid, the defendant, as indorser and drawer, was to remain liable upon them as in ordinary cases. The effect will be, that if the payee or acceptor fail to pay, the defendant would be liable, but only on his original undertaking, viz., to pay 15s. in the pound. Thus, if the bills are honoured, that payment will discharge him; if dishonoured, the defendant will only be liable on them pro tanto. The last clause does not discharge the defendant and his surety absolutely and at all events, but exonerates them from looking to the due application by the trustees of the money paid to them as such, which they might otherwise be bound to do.

Bolland B.—I cannot see how a doubt can arise on this agreement. The debtor proposes to pay his creditors 15s. in the pound on their debts, by two modes. In his uncle *Cullimore* he finds a friend, who advances and secures 1062l. in part of that composition. To make up the residue there are certain bills and a

he amount of which last the verdict is given. oth the parties to that note, the defendant and the plaintiffs have remedies; and if it had sded that the former should be withdrawn ability, and that Peacock only should remain agreement would have stipulated accordingly.

1864 CONSTABLE and Another ANDREW.

r B.—I continue of the same opinion which ned at nisi prius. If it should be held that trities were taken as absolute payment, the ; would in truth have only secured the pay-1s. 6d. in the pound.

Rule discharged (a).

ari an

ed v. Cheesman, 2 B. & Adol. 328; Lewis v. G. Bowen Jones. 16; also 4 C. & P. 151. Emes v. Widdowson.

EDWARDS against DIGNAM.

in "trespass" indorsed for a debt of 111, Writin treserved on 4th October 1833. The declaration pass indorsed trespass on the case on promises," and was declaration in on 29th October. A rule having been ob- assumpsit. Writ and dethe 2d November to set aside the proceedings claration were ound of variance between the writ and declang v. Skeffington (a), the court set aside both though the declaration on the authority of that case, the writ itself at the objection to the writ itself, which should had not been 1 taken earlier, was not taken, and that the taken. on the ground of variance did not arise until ration was delivered, when it was made ac-That objection goes to both writ and de-

Rule absolute. Petersdorff for, Burney e rule (b).

Jol. III. 318. ed in Michaelmas term 1833. See ante, 203, n.

in debt, and both set aside objection to previously

1884.

ELLISON against ROBERTS.

If a defendant is misled by the plainon the writ a larger sum than is due, and appears in consequence, instead of paying the sum really owing, with the costs of the writ, in eight days, as he would otherwise have done, the court or a judge will stay the proceedings on a like payment, if he applies service of a declaration. a**ccompanied** with particulars claiming the sum really due.

If a defendant is misled by the plaintif's indorsing on the writ a larger sum than is due, and appears in consequence, instead of paying the sum really owing, with the costs of the writ, in eight days, as he would

THE writ served was indorsed for 201. 1s. 6d.

Appearance on 26th As and 2l. 15s. costs. Appearance on 26th As and 2l. 1s. 6d. On 5th Nove interlocutory judgment was signed for want of s within 24 hours after demand of plea. On the 6th vember a rule was obtained to set aside this judg with costs, on an affidavit of the defendant's st the above facts, and that the defendant would have the money without appearing had the writ claimed 12l. 1s. 6d.

BAYLEY B.—As the wrong indorsement on the deprived the defendant of the opportunity of paying debt within eight days after the service, he would I been permitted to pay the debt, with the costs of writ only, had he come to the court in time. Bu proceedings now go on in vacation, and by Reg. (Mich. 3 Will. 4. No. 10. [Vol. III. p. 4.,] it is orde "that if the plaintiff omit to insert in the writ

ter required by the act, such writ &c. may be set e as irregular, on application to the court out of ch the same shall issue, or to any judge," the and and should have applied to a judge in vacation; . v. Tullock (a). Great fruitless expense might be xwise incurred if the application might be posted until term. The defendant ought, at all events, ave made the application I have suggested promptly r the delivery of the declaration. By Reg. Gen. . 2 Will. 4. No. 38. [Vol. II. 343.] "no application * aside proceedings for irregularity shall be allowed, ss made within a reasonable time, nor if the party lying has taken a fresh step after notice of the gularity." Now by the defendant's neglecting to ly to a judge within the eight days preceding the n, judgment was signed and subsequent costs have n incurred. The plaintiff should not have his costs this motion, as no mistake appears on oath.

ELLISON V.
ROBERTS.

Per Curiam.—Rule absolute on the defendant's paying within a week the debt and costs hitherto incurred, except the costs of this application. If such payment be not made, judgment to be signed absolutely, and execution to issue for the amount, and this rule to be discharged without costs (b).

(a) Ante, Vol. III. 578. (b) Decided in Michaelmas term, see ante, 208 n.

1884.

Where an arrest takės place for a much larger sum than is afterwards paid into court, yet if the plaintiff takes the smaller sum out of court without proceeding further in the Cause, the defendant has no right to his s. 3.

Rowe against Rhodes.

CRESSWELL had obtained a rule in Michaelms. term, calling on the plaintiff to show cause why the defendant should not be allowed his costs under # Geo. 3. c. 46. s. 3., he having been arrested for a large sum than the plaintiff had recovered. The arrest took place on 13th April 1833 for 91L, to which extent it was admitted that the plaintiff had a fair claim up to 6th March, when a bill was remitted by the defendant to the plaintiff's agent Johnson. On the 8th March the receipt of the bill was acknowledged in his absence from home by Jane Johnson. The defendant hereupon insisted that the bill had been taken by the plaincosts, under 43 G. S. c. 46. tiff as absolute payment on 6th March. On 6th April he returned home, and wrote to the defendant demanding the money, and saying he had no authority from the plaintiff to take the bill in payment. However it was not returned, and having been handed by Johnson to the plaintiff, he presented it and got the amount on 9th June, the day it became due. A balance of 7s. 7d. having been paid into court on 31st May. the plaintiff refused to take it out then, and repudiated the bill; but after it had been honoured, viz. on 18th June, he took the above sum out of court and taxed his costs to 9th June.

> Kelly showed cause in this term. As it might have been a question at the trial of the cause whether the plaintiff had not made the bill his own by keeping it, he presented it when due; but directly after it was honoured he took the money out of court, quâ nominal damages, with costs to that time, to which he was entitled, the plaintiff's demand having been paid pending the action (a). The payment into court admits the

⁽a) See Toms v. Powell, 7 East, 586; 6 Esp. 40, S. C. See 1 Camp. 559. notis. 3 Camp. 331; 3 East, 316; Hold's C. N. P. 6.

plaintiff to have a good cause of action, and consemently the defendant's liability to costs down to that ime. Then it ousts the operation of 43 Geo. 3. c. 46; ir a whole train of decisions establish that unless the maller sum of money ultimately recovered in the action e recovered by judgment on a verdict, the act does ot apply. Laidlaw v. Cockburn (a) is the only case show that after the plaintiff has arrested for a larger m than is afterwards paid into court and accepted by im without proceeding further in the action, the demdant can obtain his costs under 43 Geo. 3. c. 46. 3.; but Cammack v. Gregory (b), Rouveroy v. **llefson**(c), Butler v. Brown (d), and Davy v. Renton(e), relater cases, in which that decision has been cited and verruled both in the King's Bench and Common Pleas. In Butler v. Brown, the court of C. P. say hat it has been decided in five cases since Laidlaw v. Cockburn, that the statute is not applicable to those ircumstances, and cite Clarke v. Fisher (f), where Lord Ellenborough held that a "recovery" must mean recovery by judgment; and Lawrence J. added, that us the rule for payment of money into court is always btained on payment of costs, it is therefore incongrous that the defendant should afterwards apply to lischarge himself from the payment of them.

Rowe v.
RHODES.

Cresswell contrà. This was an arrest for which there was no "reasonable or probable cause." The defendant remitted to the plaintiff's agent a bill of an amount sufficient to cover the debt, and it is not until long after that his agent declares he will not take the bill in payment, and demands the money. The plain-

⁽e) 2 N. R. 76. M. 1805.

⁽b) 10 East, 525. H. 1809.

⁽c) 13 East, 90. M. 1810.

⁽d) 1 Br. & B. 66. E. 1819.

⁽e) 2 B. & Cr. 711. E. 1824.

⁽f) Hallock on Costs, 2d edit. 132; and 1 Smith's R. 428.

VOL. IV.

Rowe v. Rhodes.

tiff however continues to hold the bill, which was presented and paid when due; yet during its time of running the defendant was arrested for the whole debt, and in the progress of the cause paid one shilling into court as nominal damages, thus in fact tendering the issue that the bill was taken by the plaintiff in payment of his demand. The arrest then was vexatious, having been made not only before the bill was dishonored, but before it was returned to the defendant. Butler v. Brown and Davey v. Renton, no fact was relied on to prove the vexatious arrest, except the taking the smaller sum out of court. In Plummer v. Savage (a), this court seems to have thought it incumbent on the plaintiff to give a satisfactory reason for having taken out of court a less sum than that for which the arrest took place. In Payne v. Acton (b) a verdict had been taken at the trial subject to an award, the arbitrator having found a less sum to be due than that for which the arrest took place. On the defendant's motion for costs on this act, Dallas C. J. said, the courts always attended to the circumstance of parties going before an arbitrator, and the costs were refuse on the ground that no vexation was shown. In Robinson v. Elsam (c), Bayley J. having recognized the position that a case is within 43 Geo. 3. c. 46. where the sure "recovered" is ascertained by the award of an ark trator, (for which Neale v. Porter (d), and Burns Palmer (e) had been cited,) goes on to show in case before the court, that a reference of an attorne bill to the master for taxation is a similar case entitlement the defendant to costs under this act. [Bayley B. The finding of an arbitrator to whom a cause is referred by order of a court of nisi prius after a verdict has been

⁽a) 6 Pri. R. 126. M. 1818.

⁽b) 1 Br. & B. 278. T. 1819.

⁽c) 5 B. & Ald. 661. E. 1822.

⁽d) T. 44 Geo. 3. K. B.; Tidd, 9th ed. 983. (e) Ibid. Scacc. M. 1804.

ten at the trial, is similar to the verdict of a jury (a); tif the reference is by collateral agreement, it is not thin the statute. It may be, that in Robinson v. sam the master was substituted for the jury by the ms of the reference.] Abbott C. J. and Best J., night Robinson v. Elsam a case within the spirit and ject of 43 Geo. 3. c. 46. An attorney had there at for his bill, and arrested the defendant for more in the master afterwards allowed him on reference him for taxation under a judge's order. The cirmstances of the case entitle the defendant to the nefit of this act, as the decisions on the statute have ried.

Rowe v. Rhodes.

BAYLEY B.—If the decisions on the application of Geo. 3. c. 46. have been so numerous and conting as not to leave a fair balance on one side or e other, I should adhere to the maxim, cotempo-**Dea expositio** est optima (b). Now the act passed in 03, and it appears from the admission of Littledale moving for a rule under it in Rouveroy v. Alefson, at in 1804 and 1805, two cases were decided by the ing's Bench adversely to the defendant's right to cover costs, where the arrest having been for a larger n than was afterwards paid into court, the plaintiff twithstanding took the less sum out of court and yed further proceedings. In 1805 Laidlaw v. Cockrs occurred in the Common Pleas, and Rooke and lambre Js. granted a rule treating the case as within e act. But on that case being cited in 1809 in

⁽a) In Keene v. Deeble, 3 Br. & Cr. 492. M. 1824. Bayley J. said, that Note v. Porter and Burns v. Palmer, "a verdict was taken on which dynamt was afterwards entered; the money was therefore recovered in e action," and that was so in Payne v. Acton, 1 Br. & B. 278, and broad v. Taylor, 6 Bingh. 280; Turner v. Prince, 5 Bingh. 191. See to Thompson v. Atkinson, 6 B. & Cr. 193.

⁽b) 4 Inst. 138.

Rowe v.

Cammack v. Gregory (a), the King's Bench held, that in order to bring a case within the provision in question there must be a recovery of the smaller sum, which they explained to be by the verdict of a jury. Rouveroy v. Alefson (b) followed in 1810, and the court of King's Bench referred to its former decisions as well as to Laidlaw v. Cockburn, and again held that the statute did not apply to a case like the present. Butler v. Brown (c) the court of Common Pleas re-considered the decision of Laidlaw v. Cockburn, and Dallas C. J. said, it had been decided in five subsequent cases that the statute did not apply to such a case as the present. Laidlaw v. Cockburn was there treated as a deviation from the current of decisions. and was abandoned and disavowed accordingly. Robinson v. Elsam (d) was a subsequent case in which an action having been brought on an attorney's bill, the ; bill was referred to the master to be taxed, who reduced it below the sum for which the arrest had taken place = Abbott C. J. rested his judgment on the jurisdiction othe court over attornies as its officers, saying it was therefore unnecessary to decide whether the case was within the statute, though it appeared to him to within its spirit and object. The other judges machine the remarks which have been cited in favour of defendant, but I think the real ground of the case that the master being to be considered the constitute tribunal, with peculiar jurisdiction for taxing a bilk costs referred to him by the court, the sum which he should find to be due would be the sum "recovered." In Davey v. Renton(e) the arrest having been for 15. and upwards, 6l. was paid into court; and there was a very strong affidavit to show that only that sum was due. The cases were brought before the court, and Abbott C.J.

⁽a) 10 East, 525.

⁽b) 13 East, 89.

⁽c) 1 Br. & B. 66.

⁽d) 5 B. & Ald. 661.

⁽e) 2 B. & Cr. 711.

Rowe v.

said, "It is very desirable to lay it down as a general rule, that where money is paid into court by the defendant and taken out by the plaintiff in an early stage of the cause, that shall not be considered as a sum recovered by the plaintiff within the meaning of the statute. The fact of the plaintiff's taking money out of court is not conclusive against his right to recover a larger sum; he may have been induced to accept the smaller sum to save the expense of litigation. It is the sum accepted by him in lieu of the sum which he might perhaps have recovered if he had proceeded to judgment. We are all of opinion that the statute does not apply to such a case." This then being the state of the decisions in the King's Bench and Common Pleas on this point, and it not appearing that the point has been since agitated, we think we ought to abide by them. That being so, the merits are not in discussion.

VAUGHAN B.—Were this question res integra, we should look to the words of the statute and sift the meaning of the word recover. That word, however, as used in the act, points to recovery by verdict or judgment in the action, and to execution thereon. Though the cases are conflicting, they preponderate in favour of the plaintiff, and for some years before I left the Common Pleas it was considered that Laidlaw v. Cochburn was wrong. Then whether we look at the act or the decisions, the defendant is excluded from a right to costs.

BOLLAND and GURNEY Bs. concurred.

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Rule discharged with costs, though not moved with costs, as costs would have been given had it been made absolute. 1834.

Summers against Grosvenor.

The defendant having been arrested for 33*l.*, a verdict was taken at the trial for that amount, subject to the award of an arbitrator, who ordered the verdict to be reduced to 31. 3s. The defendant having moved for his costs under 43 G. 3. c. 46. s. 3.: Held, that the above facts made it incumbent on the plaintiff to "make it appear to the satisfaction of the court" that he had "reasonable or probable cause" for arresting the defendant, and in the absence of a clear statement to that effect, the court made the rule absolute.

TALFOURD Serjt. had obtained a rule for costs to the defendant pursuant to 43 c. 46. s. 3. The defendant was arrested for the trial of the cause at Shrewsbury the plaint verdict for that sum, subject to reduction by 1 ficate of an arbitrator, who certified that on was due to the plaintiff, and directed the verd entered accordingly. The defendant's affida stated the arrest to be malicious, and with sonable or probable cause, and that at the tin arrest he believed the plaintiff was indebted The plaintiff's affidavit denied the malice & asserted that defendant had several times pro pay him money on account of several bills deli him for money due to plaintiff, and that be plea he knew of no claim against him by defe of what it consisted.

Ludlow Serjt. showed cause. The original had never been lessened on a balance struck the parties, and the plaintiff did not know of ar demand on him by the defendant. Then th was justified, and it has never been held that t fact of a verdict having been given for a sma than that for which the arrest took place, was reason for depriving a plaintiff of costs.

Talfourd Serjt. was stopped.

BAYLEY B., after stating the section of the its proviso, added—There must be some affide the defendant's part to ground his application for and I think that what he has here sworn is so

to throw the burden on the plaintiff of showing reasonable or probable cause for arresting for 33l., when the sum which having been found by the verdict we must primâ facie take to be that really due, was 3l. 3s. only. The plaintiff might have easily shown how he considered himself entitled to the larger sum, by what witnesses he expected to prove his claim to that extent before the arbitrator, and why he failed in so doing. In the absence therefore of any affidavit by the plaintiff of these facts, which lay peculiarly within his knowledge, the verdict shows that there was no reasonable or probable ground for the arrest, and the rule must be absolute.

Summers v.
Grosvenor.

VAUGHAN B.—It appears to me that the defendant is entitled to the benefit of this enactment, according to its reasonable construction when read with the proviso. The very circumstance of the amount of the verdict entered raises a strong presumption that the arrest was without reasonable or probable cause. The plaintiff does not go the length of swearing that the 33l. was due to him, but merely that he had sent in some accounts of money due, and that there had been promises to pay money on account. The defendant swears he believes the arrest to have been malicious; that, I think, was unnecessary.

BOLLAND B. concurred.

GURNEY B.—The defendant states, that at the time of the arrest he believed the plaintiff indebted to him. That made it incumbent on the plaintiff to show that he had reasonable and probable cause to arrest, and for the amount he did; but no facts have been stated by him to lead us to such a conclusion.

Rule absolute (a).

(a) See the preceding case.

1834.

Pickup and Another Executors against WHARTON.

Where in an action commenced by an executor before 1st June 1833, he sued necessarily in his representative character, and depromises to his testator in his ment as in case of a nonsuit was obtained in November 1833, but the executor took no step after 1st June in that year: Held, that he was not liable to pay the whole costs of the cause, but only such costs as had been occasioned by his own negligence in not proceeding to trial.

A SSUMPSIT on a promissory note given to the plaintiff's testator in 1812, without any counts on promises to the plaintiffs as executors. The action was commenced in June 1832, and the defendant held to Pleas: general issue and statute of limispecial bail. tations (a). Notice of trial was given for the summer clared only on assizes of 1832, but countermanded, and a rule for judgment as in case of a nonsuit, obtained in Michaelmas life-time, judg-term 1832, was discharged on a peremptory undertaking; but fresh default having taken place, judgment as in case of a nonsuit was finally had in Michaelmas term 1833, and the master taxed to the defendant the whole costs of the cause against the plaintiff.

> Butt had obtained a rule for reviewing the master's taxation and confining his allocatur to such costs only as accrued after the plaintiff's wilful neglect to proceed to trial; Woolley v. Sloper (b). The plaintiff's affi davit stated facts to show that the poverty of the defendant had occasioned their delay to proceed an final abandonment of the suit, and that he had promise to pay, though verbally only, within six years.

> Addison now showed cause for the defendant on affidavit, stating, that in July 1832 he had apprised plaintiffs of his intended defence on the statute The master was right in allowing —the defendant the whole costs under these circumstances. The rule of law exempting executors from liability to

⁽a) See Sarel v. Wine, 3 East, 409; Jones v. Jones, 1 Bingh. 249; Barnard v. Higdon, 3 B. & Ald. 213; Dowbiggin v. Harrison, 9 Barn. & Cress. 666; Jobson v. Foster, 1 B. & Adol. 6; Sluter v. Lawson, id. 893. (b) 9 Bing. 754.

PICKUP and Another v. WHARTON.

1834.

judgment for costs where they necessarily sue in their representative character, e.g. on a contract entered into with their testator in his lifetime, did not hinder the court from ordering them to pay costs where the judgment against them has been occasioned by their own wilful neglect or want of diligence in investigating their right to sue. If the date of the note was not sufficient warning to the plaintiffs, they ought not to have proceeded after being informed of the defence, or at least after plea pleaded, and being aware that the promise set up was only verbal. The point held in Woolley v. Sloper was, that on a judgment as in case of a nonsuit, an executor plaintiff, who has been guilty of wilful negligence in not proceeding to trial according to notice, is not liable to the costs of the cause, but only to those occasioned to the defendant by such wilful negligence. But that case was decided on the strict terms of 14 Geo. 2. c. 17., without reference to former decisions. It is contrary to Coomber v. Hardcastle (a), where the plaintiff, an administrator, having become a party to an action on a contract which had been annulled with his privity, the court ordered him to pay the costs even after he had obtained a verdict; Rooke J. saying, "It is clear upon the statute [23 Hen. 8. c. 15.] that when an executor or administrator necesvarily sues as such, he is not liable to costs; and yet it has been holden, that where an executor or administrator is guilty of misbehaviour he shall pay costs, as where he suffers himself to be nonprossed or has knowingly brought a wrong action, or been otherwise guilty of wilful default, or has discontinued or not proceeded to trial according to notice." For this last position Hawes v. Saunders (b) and Eaves v. Mocato (c) are distinct authorities. After citing Hawes v. Saun-

⁽a) 3 .& P. 115.

⁽b) 3 Burr. 1581.

⁽c) Salk. 314.

PICKUP and Another v.
WHARTON.

ders (a) and Higgs v. Warry (b), as cases in which executors who suffered judgment of nonpros were held liable to pay costs, he argued, that as the judgment as in case of a nonsuit proceeded on the same ground, viz. the negligence of the plaintiff, the defendant was as much entitled to costs in one as the other. In neither case are costs awarded on the face of the record.

Butt contrà was stopped.

BAYLEY B.—This action having been commenced before 1st June 1833, when 3 & 4 Will. 4. c. 42. s. 31. came into operation, the passage in Mr. Tidd's valuable Book of Practice (c) applies, that an executor or administrator, when he necessarily sues in his representative character, is not hable to costs on a nonsuit or verdict. It is also laid down in the same book, that he is so liable to costs upon a judgment of non pros, and that has been the settled rule ever since I remember Westminster Hall. He is held so liable because he is guilty of personal default in not declaring or replying or or taking any other proper step. That default is states on the face of the record, and the judgment is, there-refore it is considered that the plaintiff take nothing ber by his writ, and it is further considered that the defendar and do recover against the plaintiff so much for his costs. defence. I have always considered the personal de-default so stated on the record as the ground for the adjudication of costs, viz. that the plaintiff has failed _____in his action by personally neglecting to proceed with ____it. In the case of discontinuance by an executor, he liable to costs, or the reverse, at the discretion of judge, who will refuse leave to discontinue except payment of costs, if he sees blame imputable to

⁽a) 3 Burr. 1581.

⁽b) 6 T. R. 654.

⁽c) 9th ed. 978, 979.

plaintiff in improperly commencing the action; whereas if he sees that the action was fairly brought, but that from subsequent circumstances its further prosecution became improper, he may relieve such a plaintiff from payment of costs. However, Mr. Tidd proceeds to lay down generally (p. 979,) that "an executor or administrator shall pay costs on a discontinuance where he has knowingly brought a wrong action or been otherwise guilty of a wilful default, or for not proceeding to trial according to notice; but otherwise he is not liable to costs in either of these cases; nor where he merely sues en autre droit, is he liable to costs on a judgment uin case of a nonsuit." Now a judgment in case of a monsuit given under 14 Geo. 2. c. 17., has precisely the same effect as judgment against an executor on nonsuit. Then, as in the latter case, a defendant has no costs awarded to him on the record against an executor (a), he will have none when he has a similar judgment under the statute. Booth and others executors v. Holt (b), which decided that executors are not liable to costs on suffering judgment as in case of a nonsuit under 14 Geo. 2. c. 17. does not stand alone, but has been acted on to the present time. The consequence of a contrary practice would be, that in every such case the court would have to try whether the executor had improperly commenced the action or not.

PICKUP and Another v. WHARTON.

VAUGHAN B.—In the cases relied on for the defendant improper conduct and wilful default were fixed on the plaintiffs.

BOLLAND B.—In Eaves v. Mocato (c) it is laid down,

⁽a) Bigland v. Robinson, S Salk. 105, &c. &c.

⁽i) 1 H. Bla. 277. H. 1794; see S. P. per cur. in Bennett v. Coker, ■ Burr. 1928. M. 1766. and note ibid.

⁽c) 1 Salk. 314, S. C. 2 Lord Raym. 865, nom. Elucs v. Mocato.

PICKUP and Another v.
WHARTON.

that an executor shall not pay costs of a nonsuit where = he cannot sue but as executor, but that in trover by anexecutor upon a conversion in his own time, he shall, if nonsuit, pay costs, "for he need not name himself exe-His liability to costs when nonprossed The executor's duty is to rests on his negligence. enforce the testator's securities; a doctrine recognized in Coomber v. Hardcastle (b), where Lord Alvanley admitted that an executor or administrator necessarily suing as such is not made liable to costs by statute 23 Hen. 8. c. 15. where there is a verdict against him, and that no costs could be awarded against him on record, stating the reason to be, that he is not supposed to know the imbecility of his own suit. the executor there had abused the process of the court by suing against good faith and his own agreement, the court ordered him to pay costs for that contempt. That principle was acted on in Woolley v. Sloper, where the executor, having suffered judgment as in case of a nonsuit, was held only liable to pay costs incurred by his own wilful neglect to proceed to trial.

Gurney B.—In Coombe v. Hardcastle the executor being aware that no cause of action existed against the defendant, lent his name to a third person under an indemnity from him. For such monstrous abuse of the process he was mulcted in costs.

The court were about to make the rule absolute, but allowed it to stand over to Easter term, on the suggestion of Addison that the judgment as in case of nonsuit had been obtained after 1st June 1833, when 3 & 4 Will. 4. c. 42. s. 31. came into force, and that question was then pending in K. B. in Freeman

⁽a) Brassington v. Ault, 2 Bing. 177.

Moyes (a), whether the effect of that statute was retrospective.

1834. PICKUP and Another 17. WHARTON.

Afterwards, on May 8th, in Easter term, Butt for the plaintiffs admitted that in the case mentioned the King's Bench had held the statute retrospective, but contended that this court would in its discretion under that act pronounce the same rule.

Lord Lyndhurst C. B.—There is nothing to show that the plaintiff had not a good cause of action, had not the defendant's poverty made it unadvisable to proceed.

PARKE B.—Here the executor took no step after 3 & 4 Will. 4. c. 42. s. 31. passed; then his situation s to costs ought not to be altered.

Rule absolute.

(a) Now reported 1 Adol. & Ell. 341. Stat. 3 & 4 Will. 4. c. 42. s. 31. Cance, that " in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall (unless the court in which the action is brought, or a judge of any of the said superior courts shall otherwise order) be liable to pay costs to the defendant in case of being nonsuited or a verdict passing against the plaintiff; and in all other in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself, and the defendant shall have judgment for such costs, and they shall be recovered in like manner.

Bentley against Hook.

A Rule had been obtained on behalf of the sheriff of The court will Oxon, under the adverse claim act 1 & 2 Will. 4. not interfere c. 58. s. 6., calling on the assignees of Hook a bankrupt verse claim act

1 & 2 Will. 4.

c. 56. s. 6. in

wour of a sheriff who has seized goods under a fi. fa., unless an actual claim of the Property in question appears to have been made before moving for the rule. Semble, in an issue directed under the act, the claimant should be the plaintiff and the execution creditor the defendant.

BENTLEY
v.
Hook.

and his execution creditor, to appear and state their claim to the goods seized under a fi. fa. for 33. The affidavit, without stating in terms a claim by the assignees, stated "that the sheriff had received notice that the defendant had become a bankrupt, and had been informed and believed that a fiat of bankruptcy had been issued against him and assignees chosen." The sheriff offered to bring the 33. into court.

Addison for the execution creditor. The facts in the affidavit do not show such a claim by the assignees to exist as entitles the sheriff to the protection of this act. Isaac v. Spilsbury (a) shows, that the court will not act upon the mere quia timet of the sheriff without actual claim made.

R. V. Richards for the assignees asked for costs, to be paid them by the sheriff, no notice of claim by them being shown, but information and belief only.

Cooper in support of the rule. The sheriff was bound to take notice of the fiat in the Gazette. But the objection to entertain this rule is waived by the appearance in court of all the parties. He cited Leven v. Eicke (b). In Isaac v. Spilsbury the claim made was held null, not having in fact been made on the part the wife.

BAYLEY B.—No part of the affidavit shows that trassignees have actually claimed the goods. It shows have shown from whom the notice to the sheriff cares.

As it stands it might be mere hearsay.

VAUGHAN B .- To give this court jurisdiction &

⁽a) 10 Bing. 3.

⁽b) Ante, 157.

grant this rule, the sheriff must show such an actual claim to have been made to the goods in question as unight be followed by an action.

1834. Bentley v. Hook.

GURNEY B.—The sheriff may now move to enlarge the return of the writ, and may renew this application when the claim is made.

Rule discharged with costs.

Cooper afterwards produced a sufficient affidavit and renewed his motion, which was granted; Bayley B. saying, Let the assignees sue the execution creditor either in trespass, trover, or money had and received; or by consent an issue may be taken to try whether the goods are the property of the claimants or not. In the latter case the claimants will be the plaintiffs. That would be their situation in an action of trover, and I have always thought that the course of that action should be followed in issues of this kind.

BATES against PILLING.

A Bailable capias having been issued herein for A defendant 241. 4s. 9d., the bailiff sent to the defendant's against whom a bailable a bailable a bailable a bailable a bailable accurate if capias had be would undertake that a bail bond should be given. issued was not arrested, but hail-bond was accordingly given and bail above put a bail-bond in due time and perfected. The arbitrator to whom was given and special bail e case was referred at the York assizes awarded put in and 131.5. A rule having been obtained for allowing the perfected in due time: efendant his costs under 43 Geo. 3. c. 46. s. 3.,

Held, that not having been " arrested" as

ell as held to special bail, he had no remedy for costs against the plaintiff, though be did not recover a sum for which the defendant could be held to bail, and less than alf of that for which this arrest took place.

1834. BATES PILLING.

R. Alexander showed cause. As no actual arrest has taken place, this case is not within the words of the act "arrested and held to special bail." . Berry x Adamson (a) shows that attending at the house of a sheriff's officer, pursuant to a message from him t that effect, and there executing a bail-bond, is not a arrest so as to support an action for malicious arrest In Amor v. Blofield (b) a defendant against whom: bailable writ had issued for 281., was allowed to fil common bail without being arrested, and was held no entitled to the benefit of the rule here moved for, though only 14l. was recovered. Handley v. Levy (c), Doules v Brett (d), Erle v. Wynne (e), show that the words of this act are now strictly adhered to.

R. V. Richards contrà. The requiring excessive bail is as much within the object of this act as the actually arresting for too large a sum. In Amor -Blofield special bail was not put in. This act was n. in contemplation in Berry v. Adamson; the questithere being, whether the facts in evidence proved t actual malicious arrest which it was incumbent on the plaintiff to prove. No arrest need be shown in action on bail-bonds, Haley v. Fitzgerald (f); nor can bail traverse the arrest, Taylor v. Clow (g). [Bayley-Such defendants are estopped by their own act fire making that traverse.]

BAYLEY B—The enacting words of 43 Geo. 3. c. 46. (intituled "an act for the more effectual prevention of frivolous and vexatious arrests") apply to all actions wherein the defendant or defendants shall be arrested and held to special bail. Those are not synonymous

⁽a) 6 B. & Cr. 528.

⁽b) 9 Bing. 91.

⁽c) 8 B. & Cr. 637.

⁽d) 10 B. & Cr. 117.

⁽e) Ante, Vol. III. 375. (f) Stra. 643.

⁽g) 1 B. & Adol. 223.

terms, but require different proceedings in which dif-**Exercit** parties act. Berry v. Adamson treats them **execordingly.** For, as the plaintiff had there been put the difficulty of procuring bail, the case would be in close analogy to this act, had arrest and giving a bail-**Example 2** But Lord Tenterden asked, Has the defendant been either actually or construccively arrested and kept in prison? and added, Arrowmith v. Le Mesurier (a) shows he has not." Amor v. Blofield is an instance of a similar application to the present, in which, as there was neither actual arrest nor a holding to special bail, the judgment goes far beyond the point urged for the defendant in this case, and the expressions of Tindal C. J. and Bosequet J., clearly distinguish between arrest and holding to bail, treating them as different things. being so, and only the copulative "and" being used, me ought not to read it in the disjunctive "or."

BATES
v.
PILLING.

VAUGHAN B.—In the introductory part of section 1 of this act it is provided, that no one shall be arrested held to special bail, while in the subsequent part and interposed in lieu of or. In the third section now in discussion the words are "arrested and held to special bail." Then both expressions must be taken to have been advisedly used by the legislature. The act is penal as well as remedial, and I think that arresting as well as putting in special bail is requisite in order to bring a case within its purview. I think that in the coverse case putting in special bail is necessary as well sectual arrest.

BOLLAND B.—I entertain no doubt, and agree with my brother Vaughan as to the use of the disjunctive

(a) 2 New R. 211.

BATES
v.
PILLING.

"or" and copulative "and," as found in different sections of the act. Amor v. Blofield, if not precisely this case, shows that the court of Common Pleas considered "arrest" and "holding to special bail" as different things.

GURNEY B. concurred.

Rule discharged.

KING against MONKHOUSE.

If a plaintiff living in a place not "within any city, town, parish or ham-let," (e. g. Gray's Inn) and suing in person, describe himself as of the extraparochial place, it is sufficient under the uniformity of process act, 2 Will. 4. c. 39. s. 12.

THE affidavit of debt described the plaintiff of Gray's Inn Square, Middlesex, which appeared to be the fact by the defendant's affidavit. The capies was indorsed as issued in person by W. H. King, who resides at No. 7, Gray's Inn Square, London. On motion to set it aside, cause was shown that Gray's Im being extra-parochial was a sufficient description, and London was a proper addition, as the usual direction added to persons living in Gray's Ins. In support of the rule it was said, that Gray's Inn should have been kil as the general district. It is in Middlesex, not London. Per Curiam—Stat. 2 Will. 4. c. 39. directs by section 19, that in the case of a plaintiff suing in person, the meanrandum shall mention "the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any. Now as this plaintiff lives in a place not within any city &c., the description seems as good as could be given. Rule discharged: Mansel for, Hutchinson against the rule (a).

(a) See Ditcham v. Chivis, 4 Bing. 70.

1834.

GREGORY qui tam &c. against ELRIDGE.

PLATT moved to stay proceedings until security for Security for costs should be given. It appeared from the de-Sendant's affidavit that the plaintiff sued qui tam in this where the and several other actions for penalties in keeping un- in indigent licensed places for dancing and music. He was brother- circumstances, in-law of his attorney in all the actions, and in poor cir- in several accumstances, and belief was sworn to that the actions were tions, his brother-in-law brought for the benefit of the attorney.—BAYLEY B. being attorney There is no instance of this motion being granted on in them. account of a qui tam plaintiff being in indigent circumstances. That so frequently happens, that acts of parliament would have been rendered nearly inoperative had such security been required. Rule refused.

WIGLEY against EDWARDS.

DROCEEDINGS had been taken on the bail-bond A notice of because the notice of bail did not state that the bail need not state that the bail-piece and affidavit of caption had been filed with bail-piece &c. falcer at the proper office," the cause being a town with the filacer A rule having been obtained to set aside the at the Exprecedings for irregularity, cause was shown that the shove words were necessary in a notice of bail in this mality in a notice of bail wert. Appendix to Dax's Practice, 2d edit. cxvii. does not en-For the bail it was contended, first, that the notice was title the plaintiff to take an secrect; secondly, that informality in the notice of bail assignment of did not entitle the plaintiff to take an assignment of the bail-bond: Rex v. Sheriff of Middlesex in Duncombe v. Crisp (a).

has been filed chequer office.

An inforthe bail-bond.

Per Curiam.—It appears to us to be entirely un-

(a) Ante, Vol. III. 440.

WIGLEY v.
EDWARDS.

necessary to state that the bail is filed with the filacer. In the King's Bench bail is filed at the chambers of some judge of the court. In this court it is taken away and filed with the filacer in the Exchequer office. Then, as in the King's Bench it is never stated to be filed with the particular judge, that being implied, there is no reason why it should be necessary to state it here However, we rest our decision on the case cited. Is future we shall not consider it necessary that the state ment of the place where the bail is filed should form part of the notice of bail.

Rule absolute with costs (a).

(a) See Bell and another, Assignees of the Sheriff of Middlesex, v. Feeter on others, 8 Bing. 334. Objections to notices of bail should be made when the bail appear.

NORTHWAITE, Executor &c., against BENNETT.

A churchwarden cannot, by ordering repairs to be done to a parish church, render his cochurchwardens liable without their consent, and if he does, he is personally liable.

A SSUMPSIT for goods sold and delivered, and work and labour by the testator. Plea, non assumption, with notice of set-off for work and labour &c. done by defendant for testator. The defendant had repaired a parish church by order of the plaintiff's testator who was the acting churchwarden, and the work had been approved of by the vestry and part of the account paid. The question at the trial was, whether this work and labour &c. could be set off? Against the set-off, it was objected for the plaintiff, that the testator, if liable at all, was only liable jointly with the other churchwardens. Bayley B. before whom the cause was tried, held the testator personally liable, there being no evidence that the other churchwardens knew of the order or had

authorized the plaintiff's testator to act for them. The set-off being proved, and exceeding the balance claimed by the plaintiff, he was nonsuited, with leave to move to enter a verdict.

1834.
NORTHWAITE
v.
Bennett.

Petersdorff moved accordingly. The defendant's right to recover for his work was against all the churchwardens, the work being one which they were collectively liable to do under pain of ecclesiastical censures. The demand being joint could not be set off. Their liability is qua corporate body; Wormwell v. Hailtone (a). [Bayley B. The plaintiff's testator was not bound as churchwarden to do the repairs on credit (b)]. In case of accident, immediate repairs may be requisite before a rate can be raised.

Lord Lyndhurst C. B.—The plaintiff's testator here employed the workmen on his own authority, nor does it appear that he ever communicated with the other churchwardens. No fund appeared to exist at the time out of which the repairs might be paid for. I question if a churchwarden is bound to incur responsibility by putting a church in repair if the parish do not previously supply him with funds for that purpose. The plaintiff's testator therefore was personally liable for the work which he ordered (c).

BAYLEY B.—I nonsuited the plaintiff considering the subject-matter of set-off to constitute a separate demand against his testator, he having ordered the

⁽e) 6 Bing. 668. See Prideaux's Directions to Churchwardens, 8th ed. by Tyrobitt. Index, tit. Corporation.

⁽i) The regular way is to raise the money by a rate before incurring expenses. See 12 East, 558, and other cases collected, Prideaux, 108, 11.

⁽c) See Lenchester v. Tricker, 1 Bing. R. 201; Lanchester v. Frewer, 2 id-361, cited 3 Bing. 479; Lanchester v. Thompson, 5 Madd. R. 4.

NORTHWAITE V.
BENNETT.

I thought the other two churchwardens not liable, because the plaintiff's testator was not shewn to have had any authority express or implied from them to incur the debt. I also thought it his duty to take care that he had funds in hand, and to pay ready money. Wormwell v. Hailstone was an action against a mere nominal defendant as clerk to the trustees, so that the whole question was, whether a person compelled to be a defendant ex officio by a statute could be made liable to a fi. fa. de bonis propriis. It is probable that it would be a good answer for a churchwarden to a libe in the spiritual court for not repairing a church, that he was not bound to use his own money, and had taken steps to get a rate paid, but without success. did not appear that the plaintiff's testator comme nicated the fact of this order to his co-churchwardens.

Per Curiam. - Rule refused,

Jones against Key.

A defendant being under terms to "rejoin gratis," need not join in demurrer within 24 hours after demand of joinder in demurrer. THE plaintiff being under terms to rejoin gration, had not joined in demurrer within 24 hours after joinder in demurrer had been demanded. The plaintiff gave no rule to join in demurrer, but signed judgment, which a baron by order had set aside for irregularity. On motion by Mansel to rescind that order, the court said, The master reports to us that rejoining gratia desent not extend to a joinder in demurrer where the incomplete in law, for he may join issue to the country without the consideration that is necessary to joining in demurrer. Nor does "rejoin" apply to joinder in demurrer.

(a) See Clark v. Adams, Vol. II. 753.

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1834.

KIRBY against ELLIER.

A N order had been made at chambers against the Though a judge at champlaintiff's consent to stay proceedings on payment bersmay make of debt and costs by monthly instalments, plaintiff to an order for stayhave execution for the whole on default of any one ing proceedpayment. The plaintiff delivered a declaration, treating ings on payment of debt the order as a nullity. On motion to set aside the and costs, he declaration with costs, the court said, that a judge at payment by chambers could at most only stay proceedings on pay-instalments, wat by the defendant of the debt and costs in the time defendant he would have had to do so by law. Though by this more time than he would order some money was paid before the plaintiff could have had by have obtained it by law, the final discharge of the debt law. was postponed for months. The defendant having given up the costs under the second order, the action was **Extled.** Chilton for, Platt against the rule.

LARDNER against DICK.

SASE for injury to plaintiff's reversion. The de- By the proper claration contained nineteen counts; ten stating construction of Reg. Gen. possession to be in the plaintiff, and the other nine Hil. 2 Will. 4. his tenants (a). The plaintiff had a verdict on three fendant is not The defendant had a verdict on the rest. entitled to the The Master having allowed the plaintiff his general of issues found Costs minus the costs of the issues, found for the de- for him, including the Tendent, without allowing the defendant the costs of witnesses, or witnesses called as well to disprove the issues found for witnesses plaintiff as to prove them found for defendant. Jervis whose testirecord for a rule to review the taxation, on affidavit that in part appli-

mony was only cable to those issues; but the plaintiff

(a) See Martin v. Goble, 1 Camp. 320.

has a right to the general costs in respect of the issues found for him-

LARDNER v. Dick.

all the defendant's witnesses were necessary to prove the issues on which he had succeeded, and that the testimony of two of them applied principally to those issues, and not materially to those found for the plaintiff. He claimed for the defendant the general costs of the cause on all the issues found for him, including the expense of witnesses.

BAYLEY B.—Before it was ordered by Reg. Ga. Hil. 2 Will. 4. No. 74. Vol. II. 347. "that no costs shall be allowed on taxation to a plaintiff on any counts or issues on which he has not succeeded, and that the costs of all issues found for the defendant shall be deducted from the plaintiff's costs, there could not have been a pretence for this motion; and I think the Master has put the proper construction on that rule.

Rule refused (a).

(a) See Cox v. Thomason, ante, Vol. II. 411.

Duckett against Williams.

Before effecting a policy of life insurance, a declaration and statement of health, freedom from disease, &c., was signed by the assured. By one clause "if any untrue averment" was contained therein, or if

PREVIOUS to making the insurance for the life of one Stevenson, which formed the subject of this action, the following declaration and agreement had been signed on behalf of the plaintiffs (a):

"We S. B. M. and G. D., trustees of the Provident life-office, do hereby declare and set forth, that J. Stevenson is now in good health and has not laboured under gout, dropsy, fits, palsy, insanity, affection of the

true averment" (a) The action was by the Provident life-assurance company against was contained Hope insurance company.

the facis required to be set forth in the above proposal were not truly stated, the promiums were to be forfeited and the assurance to be void: Held, that as the bealth &c. of the party whose life was insured was untruly stated, though not to the knowledge of the party making the declaration and statement, the premiums &c. were forfeited, and could not be recovered back.

Imps or other viscera, or any other disease which tends to shorten life, and that his age does not exceed 41 years: that we have an interest in his life to the amount of 50001. And we agree that the declaration or statement hereby made shall be the basis of the agreement between us and the *Hope* insurance company; and that if any 'untrue averment' be contained herein, or if 'the facts' required to be set forth in the above proposal be not 'truly stated,' all monies which shall have been paid on account of the assurance made in consequence hereof shall be forfeited, and the assurance itself be absolutely null and void."

DUCKETT O. WILLIAMS.

On the first trial the life was found not insurable, and the court sustained the verdict on a rule to set it uside as against the evidence. It having been agreed to try a second action in order to settle whether the Plaintiff was entitled to recover the premiums paid, the jury then found the life was insurable, and gave a verdict for the plaintiffs. A rule for a new trial having been obtained and argued in a former term by the Solicitor-General (Sir John Campbell) and Kelly for the plaintiffs, and by F. Pollock and R. V. Richards for the defendants, it was left by consent to the court to form their own conclusion on the facts and on the meaning of the agreement.

Cur. adv. vult.

LOTA LYNDHURST C. B. now delivered the judgment the court in nearly the following terms:—This was naction on a policy of insurance on the life of John Stephenson. On his death an action was brought to ecover the amount of the sum insured. The defendant's case was, that at the time the insurance was effected the life was not insurable, and they obtained a verdict which the court did not think it right to disturb. However, on discussing the rule for a new trial, it was urged that the plaintiffs were entitled to a return of

DUCKETT

N
WILLIAMS.

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the premiums if the life was not insurable; but it tuess out that that return had not been claimed at the tris It having been subsequently agreed that that questic should be tried in another action the plaintiffs had verdict, but it was arranged, on motion for a new tris that the court should look into the agreement and the rest of the evidence, and form their own conclusion: to the matters of fact. We have done so, and are opinion that at the time when the policy was effects Mr. Stevenson had on him a disease tending to should life. The consequence is, that the facts set forth: the proposal were "not truly" stated within the meaning of the declaration and agreement, and the questic entirely turns on the construction of that decleration and agreement made by the assured before the pelic was effected. For the plaintiffs, it was urged that the words must mean "truly" or "untruly" within the knowledge of the party making the statement; as that if the insurer ignorantly and innocently makes. misstatement, he is not to forfeit the premiums unde the clause in the agreement. But that appears to a not to be the real meaning of the words. A statemen is not the less "untrue" because the party making ki not apprised of its untruth, and when we look at the context we think it clear that the parties did not mee to restrict the words in the manner contended for Two consequences are to follow if the statement h untrue, first, that the premiums are to be forfeited the other, that the assurance is to be void. Now: the statement were untrue within the knowledge of the party making it, the assurance would be void withou any such stipulation. The knowledge of the party: clearly immaterial as to this last consequence, and therefore be so as to the first, for we should violate the rules of construction by holding it material at one consequence and not as to the other. Our oninio

therefore is, that these premiums are forfeited under the clause in question. A nonsuit must be entered.

Rule absolute accordingly.

1884 Duckett Williams.

BRAINE Assignee against Hunt and Another.

N the first day of the term Cooper on behalf of the If a sheriff sheriff of Oxon moved for the usual rule to stay proceedings under the interpleader act, 1 & 2 Will. 4. seized under a 4.56. s. 6., on an affidavit that he had seized certain claimant, a mode of the defendant which were in his possession, stranger to the and that a claim had been made to them.

George interposed by moving for an attachment under 1 & 2 minst the sheriff for not returning the fl. fa., and stating that the plaintiff had had no notice of the claim by a third party to the goods in the sheriff's a third party hands, or that the latter intended to move under the SCL.

The court refused to grant the attachment until it move under was ascertained whether or not notice of the claim had Will. 4. is not been given to the execution creditor before instructions to the execuwere given to move for the attachment. No affidavit tion creditor having been produced that such notice had been given, tions given by The court on a subsequent day refused the attachment the latter to and granted Cooper his rule, on the terms of payment attachment for by the sheriff of the costs of the motion for an attach- not returning the writ, the Enent.

Miller appeared for the claimant.

W. H. Watson for the execution creditor. The wheriff's officer gave up to the claimant, under a bill of sale, all the goods he had seized except a fly carriage.

Cooper in support of the rule. It does not appear that the fly was not sufficient to satisfy the execution, my does collusion appear.

hands over any goods fi. fa. to a execution, he is not entitled to protection Will. 4. c. 58.

If notice of a claim by and of the sheriff's intention to before instrucmove for an attachment will be granted

BRAINE
v.
HUNT
and Another.

BAYLEY B.—To entitle himself to our interference the sheriff ought to remain indifferent, and not collect with either party (a). The object of the act was, that t try the property in the goods taken in execution, ther should be only one cause, in which the parties in terested should be the only litigants, and that the sheri should be then exonerated. In the proper course th claimant might have sued the plaintiff to try the righ to all the goods(b); but here, many articles which were in this case taken in execution at the plaintiff suit, have been handed over by the sheriff's officer t the claimant. The result of which is, that the plainting will be driven to an action against the claimant for the goods taken by him, and against the sheriff for the still in his possession. The act of giving up part of goods has defeated the object of the act as much all had been so given up, and is strong evidence collusion with the claimant. Nor can we assume the article remaining in the sheriff's hands would satisf the debt. The case does not come within the act. The rule must be discharged with costs; but the sherif may have ten days to return the writ.

(a) See Cook v. Allen, ante, Vol. III. 588.

(b) Bee ente, \$31.

Saunderson against Bell. Same against Same.

Where a mortgage deed was
delivered to a
party as evidence of his
title to apply

VERDICTS were taken for the plaintiff in b actions, subject to a reference by order of prius. The award stated the following facts for opinion of the court:

for payment of principal and interest due thereon, no lien attaches on the deed in respect work and labour in so applying; for the value of the article deposited is a creased by any work done on or with respect to it.

Payment to an apprentice in his master's counting-house will bind the m made in the usual course of mercantile business, and in discharge of a community but such a payment of money, if made to him on another account; as a stakeholder of a sum to be deposited with him, will not. Comm. semb.

As to the first of these causes the facts are as follows: The action was in trover for a certain deed of mortgage belonging to the plaintiff bearing date the 24th day of February 1825. The parties to the said deed were the said plaintiff M. Sanderson of the one part, and J. Rummens of the other part, and the said deed was made and entered into for the purpose of securing payment to the plaintiff by Rummens of the sum of 100% and interest on 24th February 1826. In October or November 1831, the said mortgage deed was delivered by the plaintiff to the defendant, who then was and still is an auctioneer and appraiser, for the purpose of recovering the principal money and interest due upon the mortgage. No specific agreement or bargain was mde for the defendant's remuneration, nor was there agreement that the defendant should have a lien a the deed. The defendant made application to Runners for payment of the principal and interest due pon the mortgage, and he also made similar application for payment on the mortgaged premises, and to a person who acted as receiver for Rummens of the rents of the mortgaged and other premises, and all such applications were made long before the commencement of the action. The defendant did not however by such applications obtain payment of the principal and interest due on the mortgage, or of any part thereof. The defendant had no authority to employ an attorney to enforce payment. The deed was duly demanded of The defendant before the action was brought, and he refused to give it up, insisting that he had a lien upon at for his charges in and about the above applications For payment. The plaintiff charged two guineas, which is a reasonable sum, supposing he is entitled to make any charge. If upon the above facts the court shall be of opinion that the defendant is entitled to make the mid charge, and that he has a lien for the same on the 1884: SANDERSON V. BELL said mortgage deed, then I do award that the verdict entered for the plaintiff be set aside, and that a verdict be entered for the defendant; but if the court shall be of a contrary opinion on either point, then I do award that the verdict already entered for the plaintiff do stand, but that the damages be reduced to one shilling upon the defendant delivering up or causing to be delivered up the said deed to the said plaintiff:

As to the second cause, I find that the facts are at follows: The action was brought to recover from the defendant the sum of 13l. 11s. 4d. for keep of certain horses of defendant at livery, and for goods sold and delivered by plaintiff to him, and for money paid by the plaintiff for the defendant's use. The declaration was in indebitatus assumpsit, and contained counts applicable to the recovery of the plaintiff's demand. The defendant pleaded the general issue with notice of set-off, and delivered particulars of his set-off to plain tiff's attorney, in which particulars was an item, de only one in respect of which any set-off was claimed of 501, for money had and received by the plaintiff to and for the use of the defendant. The plaintiff established his right to a verdict for the sum of 121. 16s. 4d. unless the defendant is entitled to set off the sum of 50%: to which claim of set-off I find that on the 28th March 1831, the following agreement was entered into at plantiff's house between the defendant and one Bardell.

" March 28th 1881.

"Mr. Bell bets Mr. Bardell that he drives his mane in harness from opposite the Horse Guards Gate, West minster, to Mrs. Bryerley's, the Gloucester Hotel, Brighthelmstone, and back again to the same place opposite the Horse Guards, Westminster, within the time of twenty hours. The match to be done within fourteen days from this day; the distance is to be performed in twenty successive hours from the time of

tarting. The wager is for 501., and the money is to a paid into Mr. Martin Sanderson's (the plaintiff's) ands within five days from this day: if either does not pay the full sum to him within that time, the 51. sw put down by each to be paid to the one that does not into his (Mr. Sanderson's) hands the 501.

SAMPERSON & BELL.

H. Bell. John Bardell."

At the time of the said agreement being entered tto, or in a few days afterwards, the said J. Bardell ad the defendant, pursuant to the said agreement, paid the said plaintiff M. Sanderson, as the stakeholder used in the said agreement, 50%. a-piece. No evidence been offered before me by either party to show that was done under the said agreement towards deemining the bet; nor has it been proved that prior to he plaintiff's action the repayment of the 501. deposited by the defendant with the plaintiff as aforesaid, ras ever demanded by the defendant, or by any on his whalf, from the plaintiff, and it is admitted that the lesendant has no evidence to prove any such demand; at it appears that in consequence of disputes between Bardell and the defendant on the subject of the wager, be plaintiff determined to pay back to each party the Wwhich each party had deposited in the plaintiff's hands as before mentioned, and that in consequence of the plaintiff's determination, and after a communication by letter that the deposit would be paid back if the weer was not settled in a week. On 21st June 1831, before the action was brought, the plaintiff paid back the mid sum of 501. which had been deposited by the defendant in the manner following; that is to say, the wid sum of 50% was paid by one Anne Sanderson, the plaintiff's sister, by desire of the plaintiff, to one C. Bowser, at the counting-house and usual place of business of the defendant in Oxford Street, in the

SANDERSON V. BELL. county of *Middlesex*, and the said *C. Bouser*, at the time of payment, gave a receipt for the same in the words and figures following:

"Memorandum.

"Received of Miss Sanderson 501. deposit of wager, 21st June 1831. C. Bowser."

And I find that at the time of the payment of the said sum of 50l. to the said C. Bowser as aforesaid, he the said C. Bowser was in the defendant's service as an apprentice, but no proof has been given by the plaintiff to show that the said C. Bowser had any direct authority from the defendant to receive the said sum of 501. on his account, nor has it been shown that = the said sum of 50l. did in point of fact ever come to the hands of the defendant. If, upon the facts stated. the court shall be of opinion that the defendant warm entitled to set off the said sum of 50l. against them. amount of the plaintiff's claim, then I award that ime the said second cause a verdict be entered for the defendant; but if the court should be of a difference opinion, then the verdict already entered for the plain tiff is to stand, but the damages are to be reduced the sum of 121. 16s. 4d.

A rule having been granted for suffering the verdication of the plaintiffs to stand, and for reducing the damage to one shilling in the action of trover, and to 121. 16s. 4 in the action of assumpsit,

Platt showed cause. The defendant is entitled ______ verdicts in both actions. As to the first, the mortge deed deposited with him was subject to a particular lien for his endeavour to recover the principal interest thereon; for services done in respect of the article, though not upon it, are sufficient for that purp ______. In Blake v. Nicholson (a), Franklin v. Hosier (b), Classe v. Westmore (c), and Hollis v. Claridge (d), Gibbs J.

- (a) 3 M. & 8, 167.
- (b) 4 B. & Ald. 341.
- (e) 5 M. & S. 180.
- (d) 4 Taunt. 807.

held that every one, whether attorney or not, has, by the general law of the land a lien on the specific deed or paper delivered to him to do any thing on. As to the second cause, the defendant was also entitled to set off the 50% deposited in the plaintiff's hands, as he might have recovered it back as money had and received to his use; Lacaussade v. White (a), Cotton v. Thurland (b), Bale v. Cartwright (c), Smith v. Bickmore (d). For a wager that the plaintiff could perform a journey against time on the king's highway is illegal, whether to be done in a carriage, Ximenes v. Jaques (e), or on horseback, Whaley \bullet . Pajot (f). [Vaughan B. That race was for more than 50%, and would have been legal on the turf.] The plaintiff's promise by letter to return the deposit if the wager was not decided within a week, wived any necessity for a demand. The apprentice Bowser not being shown to have authority to receive money on the defendant's account, payment to him is not payment to the defendant.

SANDERSON V. BELL,

Adams Serjt. in support of the rule. The plaintiff does not appear to have reaped benefit from the defendant's applications for the mortgage money, and gave no authority to him to proceed by other means, if he did not succeed in obtaining it. Then he is not liable to the defendant for work and labour, and if he was, no work having been done on the article, the defendant could not have a lien. That appears by the cases cited. The judgment of Gibbs J. in Hollis v. Claridge was only intended to apply between parties who would have been liable had the work been done. In Wallace v. Woodgate (g), Best C. J. held, that a livery-stable keeper had no lien on horses for their

⁽a) 7 T. R. 535.

⁽b) 5 T. R. 405.

⁽e) 7 Pri. 540.

⁽d) 4 Taunt. 474.

⁽e) 6 T. R. 499.

⁽f) 2 B. & P. 51.

⁽g) Ry. & Moody, 193.



keep unless by special agreement; and his decision in Bevan v. Waters (a) that a trainer had a lien on a recohorse for his charge in training him, turned on the old acknowledged common law principle, where the bailee expends labour and skill in the improvement of the subject delivered to him, or, to use the words of Lord Lyndhurst in Judson v. Etheridge (b), "in altering the character of the horse so as to put him into cosdition to run at races." As to the payment to the apprentice, he could not be found to be produced before the arbitrator; but the payment to him was good, having taken place at the defendant's countinghouse and usual place of business, and not being repudiated by the apprentice for want of authority to In Barrett v. Deere (c) payment to a person found in a merchant's counting-house, and appearing to be intrusted with the conduct of the business, was held good payment to the merchant, though it was distinctly proved that he had never employed the person or received the money. The real ground of that decision was, that the debtor has a right to suppose that the creditor, a tradesman, will not allow persons to come on his premises and there intermeddle with his business without his authority. [Bolland B. Must not the test of the payment at a tradesman's counting-house being good or bad depend on whether it takes place in the course of business? Can a payment of a sum to a shopman or to a clerk at a counting-house, and not being in the comme course of commercial business, e. g. a legacy or a more gage debt due to the principal, be binding on the latter! Wilmot v. Smith (d) decided, that where a person in the

⁽a) Moody & M. 235. See also Jacobs v. Latour, 5 Bing. 130.

⁽b) Ante, Vol. 111. 938.

⁽c) Mooly & M. 200, cor. Lord Tenterden. See Maffatt v. Param. 5 Taunt. 307.

⁽d) Moody & M. 238.

office of the plaintiff's attorney, on being referred to by another clerk in the office to whom tender had been first made, and rejected by him on the ground of want of suthority to act, refused to receive the sum, not from want of authority, but on account of its being too small; the tender was good, though it did not appear who the person was. A demand that the money deposited ahould be returned was necessary before it could be sued for or set off. [Bayley B. It was recrived by the plaintiff ab initio to the use of defendant. But here it was to be paid over within fourteen days: is not then a fresh subject of demand, and after that ine had elapsed the defendant held it for the plainiff's benefit. Then it might have been recovered in action which in itself would be a demand, and so is * set-off.] The stakeholder was entitled to notice that the time was passed and the wager was not, nor would be decided. [Bayley B. The match was to be done within fourteen days from the date of the agreement.]

Sanderson v.
Bell.

BAYLEY B. having stated the terms of the motion, proceeded thus:—As to the action of trover, if the defendant had a lien on the subject-matter of the action, the verdict must be entered for him; if he had not, there must be a verdict for the plaintiff with one shilling damages. The facts of that case were, that the plaintiff having a mortgage deed on which money was due, put it in the hands of an auctioneer in order to receive the principal and interest. It was not shown that he was to do anything with it except giving it to the mortgagor, to show that he had title to require payment from him. Nor did it appear that he did anything else upon or in relation to the instrument. Now, where a party insists on a lien, the onus is on him to show his right to it. A right to lien may exist by the usage of trade or by special con-

SANDERSON v.
BELL.

tract, and there is another sort of lien where a man po sessed of the article on which work is to be done by his does that work on it. Of that class of liens is Chase Westmore (a), where a miller, who by agreement wit the owner, had bestowed labour in grinding corn at fixed price per load, was held entitled to detain it unt the price was paid. The question there was, whether th special bargain for the price of grinding superseded th lien which originally existed. The court held that did not, and that the defendant might according detain the corn until the fixed price was paid. that was a case in which work was done on the articl forming the subject of the action of trover. such work was done on the mortgage deed, which wa merely placed in the defendant's hands to be exhibite to the mortgagor as the defendant's authority to receiv the money due upon it. No authority goes so far a to decide that that would vest a right of lien in th defendant: and the cases of Wallace v. Woodgate, an Bevan v. Waters, appear to me, by pointing out th true distinction, to show that the present is not a car in which the right of lien exists. For in the first can the lien was not allowed, the livery-stable keeper havin done nothing for the horse but finding food for him whereas in the second it was allowed to the trainer, wh had bestowed his labour and skill on him in getting him into running condition, and probably claime nothing but for that training. Had the livery-stable keeper in Wallace v. Woodgate also trained the horse and his claim on that account could be separated, ther might be some right of lien; but as a compound claim for feeding and probably for dressing him was set un his claim to lien, if any, was entire, and must necessari be established or fail for both charges. In my opinion

then, this case does not fall within the class in which the defendant proposes to include it.

1834.
Sanderson
v.
Bell.

On the question in the action of assumpsit, I am of opinion that the defendant made out a sufficient primâ facie case in order to establish his right to have the money returned to him. No demand was necessary to be relied on in order to vest the defendant's right of insisting on a set-off. The true question was, whether the plaintiff was indebted to the defendant at the time of commencing the action? Now the money was deposited with the plaintiff to be paid over by him to either the defendant or Bardell, if the race took place within fourteen days. As soon as that time elapsed without the race having been run, the plaintiff held that money for the use of the defendant only. insisting on it as an item of set-off is equivalent to an action brought for it. Whether the money has been paid to the defendant is another question, as to which, for the sake of justice, we will arrange an inquiry. present no sufficient authority to Bowser to receive this money is shown on the award. An authority to receive money in the course of business may perhaps be presumed from his situation of apprentice in the plaintiff's house. But we cannot extend that presumption to payment of money in transactions which, like the Present, are out of the ordinary course of the master's business. The verdict in the first cause must stand, the damages being reduced to one shilling, and the second cause should be sent back to the arbitrator, in order that the defendant may be personally examined to having received the 50l. paid to Bowser.

BOLLAND B.—I quite agree in opinion on the second cause, for the reasons I have before stated. On the action of trover, I am clearly of opinion that no lien can exist; for if this were a particular lien, as argued, we

1834.
SANDERSON
V.
BELL.

should look in vain for a general one; for whenever it was found that work had been done on a chattel, that would raise a specific lien thereon. That lien would attach in every single instance in which one man employed another to do work in respect of an artick deposited with him. But lien attaches on a chattel where the work is to be done on it to improve it a increase its value and capability for its particular uses but no such right can exist where it is merely delivered as evidence of the bailee's title to demand money on it The trainer of a race-horse exercises a peculiar skill and if he does not absolutely create, brings freel powers into action in the animal placed under his care His claim to lien therefore stands on very differen ground from that of the livery-stable keeper who call feeds and dresses him. Those cases then show when this sort of lien begins and where it ends.

GURNEY B. concurred.

Rule absolute. The verdict for the plaintiff in action of trover to stand, and the damages to reduced to one shilling. And in the actions assumpsit the defendant to be personally mined before the arbitrator as to the payments of 501. to Bowser his apprentice, and to produce his books at the same time, the arbitrator to the court. The costs of that meeting to be paid by the plaintiff.

1834.

WHATLEY against Morland.

Narbitrator appointed by order of nisi prius, being A rule to set attended by counsel on behalf of the plaintiff, was aside the certificate of an applied to by the defendant to adjourn in order to arbitrator give time to instruct counsel on his behalf, but the the grounds plaintiff would not consent unless the defendant would of the motion. may the costs of that meeting. The defendant having tiff who did not delivered a written protest, the arbitrator proceeded give distinct ex parte, and certified that a verdict should be entered tending an for the plaintiff. A rule having been obtained to stay arbitrator by or set aside the certificate, on the ground of the plain- tended by tiff's having attended the arbitrator by counsel without refused to congiving distinct notice to the defendant of his intention, sent to an cause was shown, first, that the rule did not state the except on degrounds of objection, citing Watkins v. Philpotts (a); fendant's and secondly, that in certain conversations between the costs of the parties sufficient notice of the plaintiff's intention to meeting, the court held attend by counsel had been given to prevent any plaintiff not surprise on the defendant.

Per Curiam.—The grounds of the application should by the arbihave been stated in the rule to show cause, but that trator in his might be amended and is not insisted on here. notice of attending by counsel is not given, one party case back to the arbitrator. might obtain an undue advantage over the other. Distinct notice therefore from one attorney to the other was necessary, and such notice from a mere witness for the plaintiff is not sufficient. The plaintiff was therefore not entitled to the costs contended for.

(a) M'Clell. & Y. 394; 11 Pri. 57. S. C. See same rule in K. B. E. 1821; 4 B. & Ald. 497; Tidd, 9th ed. 844.

should state Where a plaincounsel, atadjournment paying the entitled to such costs, stayed the certificate made favour, and If referred the

WHATLEY v.
MORLAND.

Rule absolute without costs; the defendant consenting to enlarge the time for making the award (which had expired) until the first day of Easter term; the certificate to be stayed and the cause referred back to the arbitrator. The costs of the motion not to be costs in the cause. Humfrey for, J. D. Whatley against the rule.

Best, Assignee of Thorowgood an Insolvent, against Argles.

T. being indebted to defendant in about 150l., a legacy of 100l. was left to his wife, whereupon T. and and sent the following instrument to defendant :-"We hereby authorize the executors of the late Capthin A. to pay or monies that he may have bequeathed to us, in part payment of the

ment of the various sums

The being indebted to defendant in about 150l., a legacy of 100l. was left to his wife, whereupon T. and his wife signed and sent the following in
A SSUMPSIT for money had and received, with a plea of non assumpsit, tried in London at the plea of non assumpsit, tried in London at the plea of 100l. Sittings after Trinity term 1833, before Gurney B. Captain Argles, who died in July 1831, bequeathed a legacy of 100l. to the wife of Thorougood, who being then indebted to the defendant in about 150l., sent him the following instrument in a letter:—

"We hereby authorize the executors of the late "We hereby authorize the executors of the late Captain Argles to pay to you any legacy or monies that he may have bequeathed to us or either of us in part payment of the various sums you have so kindly you any legacy or monies that he may have bequeathed to us or either of the same. There appears to be about 150l. due to you.

10th July 1831. To Mr. Argles. (Signed) J. H. Thorowgood, Cath. Thorowgood.

you have so kindly lent us, and your receipt shall be to them a sufficient discharge for the same. There appears to be about 150l. due to you." Defendant communicated to the executor his claim to the legacy before T. petitioned for his discharge under the insolvent debtors' act, but the executor then said he would pay the legatee. Before T. was discharged the executor paid her legacy to T.'s wife, which she immediately handed to defendant: Held, that as it was doubtful whether the authority would operate in equity as an assignment to the defendant, divesting T. and his wife of all interest in the legacy, the interest in the legacy passed to the assignee of T. under the insolvent act.

The letter in which it was inclosed was as follows:-

BEST v.
ARGLES.

Dear George,

"Myself and Kate herewith send you order to receive any legacy and monies there may left to us by our dear departed uncle, in part payment you for the sum due, although I fear it will not cover aur demand against us: but you must take the will the deed.

(Signed) J. H. Thorowgood."

Before January 1832, the defendant informed the tecutor of Captain Argles that he had a claim on the gacy, but the executor said he would pay it to Mrs. horowgood, the legatee. On 28th February 1832, horowgood went to prison, and on the 29th filed his etition to be discharged under the insolvent act, 7 Geo. c. 57., and made his assignment. On 23d April 32, before he obtained his discharge, the executor of aptain Argles, attended by Mrs. Thorowgood and the fendant, paid the former 971. for her legacy, having aducted the legacy duty. She directly paid it over the defendant. The insolvent was discharged 19th Upon this evidence the counsel for the aintiff having admitted the transaction to be bonâ de, urged, that as the executor had refused to assent the authority given to the defendant by the insolvent nd his wife to receive the legacy, that authority was woked by the insolvent's assignment under s. 11 of Geo. 4. c. 57., no actual transfer to the defendant y payment having then taken place. The learned aron having nonsuited the plaintiff, with liberty to him o move to enter a verdict for 97L, a rule was afterwards brained accordingly, and Williams v. Everett (a) was

BEST v. Argles. cited; Bayley B. saying, the question here is not whe ther the executor was bound by the authority is question, but whether the persons who gave it were s bound, and whether, if either of them received the money, it was not so received in trust for the defendant

W. H. Watson showed cause. This being a bon fide transaction, the only question is, whether the in strument of 10th July 1831 operated as an assignmen of the legacy? Now as by that instrument the in solvent and his wife stripped themselves of all interes in the legacy, and vested it absolutely in the defendant whose receipt was to be the executor's discharge, m beneficial interest remained in the insolvent to be take by the plaintiff under the insolvent act; and the an thority, instead of being nakedly to receive, as it will b contended to have been, was coupled with an interest and therefore, according to the known distinction, wa irrevocable; then this authority, if irrevocable, was a the assignment of which the legacy was capable whil it remained a chose in action, and vested all interest i it in the defendant. An order for payment of mone out of a particular fund has always in equity been hel to be an assignment. Row v. Dawson (a) is precised in point. A. having borrowed money of B. gave him a draft on the deputy of H. W. "out of the moun due to A. from H. W. out of the Exchequer." and became bankrupt; the draft was held an assignment of the fund pro tanto, and Lord Chancellor Hardwick distinguished between an order on a particular fund and on funds generally, holding the former to be ar assignment and the latter to be only a bill of exchange That case has been followed by Yeates v. Groves (6) Ex parte South (c), and Smith v. Everett (d). In the latter case the lords commissioners Eyre and Ashurs

⁽a) 1 Ves. sen. 331.

⁽b) 1 Ves. jun. 280.

⁽c) 3 Swanst. 393.

⁽d) 4 Brown's Cha. Ca. 64.

on the ground of assent by, but of house to [Bayley B. He accepted the order and ally submitted to comply with it.] The assent holder of the sum formed no part of the de-Nor could it affect the question of ent as between assignee and assignee. Now if trument divested all beneficial interest out of ignor, there was nothing which by his subinsolvency would vest in his statutory assignee; v. Keeley (b), Carpenter v. Marnell (c). v. Wallis (d), a debt previously assigned to for a valuable consideration, was held not to be ble in the hands of the assignor. Williams v. (e) has no application; first, because there was ty between the plaintiff and the person holding nittances under directions from their owner to art of them to pay the plaintiff, so as to support n for money had and received to the use of the and secondly, because the order to pay was not to any particular fund; a transfer of a debt being in action not sufficient to enable the assignee to it without a promise to him, viz. assent by the Curon v. Chadley (f) is of no consequence

cited by Alderson J., Crossfoot v. Gurney, 9 Bing. 375. ". R. 619. (c) 3 Bos. & P. 40.

: Thomas Jones, 222. Cited arguendo 14 East, 591, Williams v.



BEST v.

here; for after an order to pay, though before such a assent by the holder of the money as would render hin liable as for money had and received to the holder of the order, the assignees of the latter, if he became bankrupt could not recover. In the case of Gibson v. Minet (a) the Common Pleas held that an order by a custome on his bankers to hold him a sum from his private account to the disposal of third persons named, migh be countermanded before it was acted on; but the order was not restricted to a particular fund. there any case in which an order to pay a sum out of a particular fund of which notice has been given to the holder, has not been held to operate as an assignment from the date of it, irrevocable as between the parties. The assent of the executor was not necessary to give force to the previous assignment of the legacy, though the notice to him was proper in order to fix him with personal responsibility after knowledge of the transfer. Fisher v. Miller(b) is in point, this being an appropriation of a particular fund to the purposes of this order, and the court will recognize that the equitable interest had passed out of the insolvent to the defendant in due time, so as to prevent any right attaching in the assignees; Winch **v.** Keeley(c), Sumptor **v.** Cooper(d). In Crowfoot **v.** Gurney (e), the bankruptcy of Streather was said to revoke his previous order to pay, but the court held otherwise; and Tindal C. J. said, that the party in whose favour the order was made might have gone into equity to compel a formal assignment, and no answer could have been given to such application. Carvalho v. Burn (f) is not contrary, for the order of 11th April 1829, was made against all the goods in the hands of the agent Rego, who did not hand over any of them accordingly until 30th June 1829, after the act of bankruptcy.

⁽a) 2 Bing. 7. (b) 1 Bing. 150. (c) 1 T. R. 619.

⁽d) 2 B. & Adol. 223. (e) 9 Bing. 372. (f) 4 B. & Adol. 382, 386.

Bompas Serit. and Comyn contra for the plaintiff. is was an interest in the wife, which never having en reduced into possession could not pass by assignnt. For had the husband died the instant after ing the authority, her right would have survived in eference to that of the defendant. [Bayley B. A shand may assign a wife's chose in action.] If this s an order to pay money out of a particular fund, it ald be a bill of exchange requiring a bill stamp; nly v. Collins (a). But this is a bare authority to zive the wife's money, which cannot vest it as by signment until assented to. Suppose it were an signment, no notice of it as such or in terms is given. the equity cases cited the orders relied on as assignmts were applicable to particular funds, and had en assented to. Here, so far from assenting, the ecutor says he shall pay it to the legatee, and is not oved to have had notice to the contrary. mmon law cases of Crowfoot v. Gurney (b), and uzon v. Chadleu (c), show that the assent of the holder the property is necessary to the passing the interest the assignee. Then this was a mere naked authov. and the insolvent's interest remained. A bill of change drawn in favour of the defendant and unmepted, would not have divested the insolvent's prorty. In Row v. Dawson (d), not only was there a huable consideration given by the holders of the order the time it was given, but it was received and asinted to by the agent who became bound to pay. The terest in the legacy could not have been recovered by my other but the insolvent. A doubtful equity will not taken into account in a court of law.

BEST v. ARGLES.

Cur. adv. vult.

⁽a) 6 M. & S. 144.

⁽c) 3 B. & C. 591.

⁽b) 9 Bingh. 372.

⁽d) 1 Ves. sen. 331.

BEST v. ARGLES. The judgment of the court was now delivered by

BAYLEY B.—In this case the question was, whether there had been such an assignment of the legacy in law or equity as deprived the plaintiff of his right, as as signee under the insolvent act, to demand payment it to him by the defendant or the executor of Captain Argles? That question depends on the effect of the authority to receive it, coupled with the letter in which it was sent. We agree that if this was clearly at assignment in equity, so that the insolvent Thorosegus had become a mere trustee for the defendant, in whom the whole beneficial interest had vested, no interest could have passed from Thorowgood to his assistness on his discharge under the insolvent act, and his are ditors would accordingly have no claim on the legacy We must see then if any such trust really existed in the insolvent, for if only a case of doubtful equity appears, it must be left to the tribunals fitted to entertain such a question. First, the instrument purports to be a mere authority to the executors of Captala Argles to pay the legacy to the defendant. executor is apprised that there is a claim by the defendant on the legacy, but distinctly replies that he shall pay it to the legatee Mrs. Thorowgood. Then he refuses to be bound or affected by the instrument in question. It did not purport on the face of it to be an order for payment out of the particular sum in his control; and if it had, an objection would arise on the stamp laws that a bill stamp would have been nocessary (a). Nor was it an order on which new credit is given or a fresh advance made. Nor is it a power of attorney, for it does not contain the ordinary terms empowering the defendant to demand, receive, and sue for the legacy. It might be an authority to claim

⁽a) See 55 Geo. 3. c. 184. Schedule, tit. Inland Bill of Exchange.

1834. Bast

ARGLES.

and receive it binding in equity, but it is a mere authority not pledging the giver on the face of it that it shall be paid, but giving the executor a warrant, if he thought fit, to pay the money according to its direction. It might in a court of equity be held an authority conferring power to make or retain payment, but its terms are not so clear that we can take on us to say that it, would certainly be the decision of a court of equity that the interest in the legacy passed to the defendant under it in such a manner that the assignee of the insolvent had no claim. If that court should so hold, they can stop the executor on their own authority. But looking at the decisions of those courts, there is nothing to justify us in concluding that Thorowgood and his wife pledged themselves that the legacy should be assigned to the defendant. In Crowfoot v. Gurney (a) the debtor was ordered to pay, and having assented to that order, became liable to pay accordingly; so that the right to sue the original debtor ended. In Ex parte South (b) also, the debtor acceded to the order, and thereby incurred a legal and equitable liability. So in Row v. Down (c), the instrument relied on was an order on a particular fund, on the credit of which money was advanced by the party to whom it was given as a **Security.** In Smith v. Everett (d) there was a valuable Consideration in work done, and the sub-contractor might be considered as entitled to have a part of the Fund set apart for him as purchaser. But this instrument does not pledge the givers that the legacy shall be paid to the party in whose favour it was made. No new advance is made on it, nor is any consideration of forbearance suggested. To conclude then that this would in a court of equity be held to be an equitable assignment concluding the rights of the assignees under the insolvent act, would be to go beyond the province

^{(4) 9} Bing. 372.

⁽b) 5 Swanst. 392.

⁽c) 1 Ves. sen. 331.

⁽d) 4 Br. Ch. Cas. 64.

1884. Ber 27. ARGUES.

The warranty of a servant respecting whose authority from his master no more appears . than that he was entrusted to deliver a horse, and to with some money in exchange, pursuant to some previous bargain, the terms of which are not shown, will not bind his principal.

of a court of law. As the equitable rights are noticles we shall in substance proceed as in Carnello vi Bu by leaving it to the defendant to establish their liefe livered the bors to the plantiff landiri regorquette Rule absolute What i represented by III A stay of the postes was afterwards obtained we answer put in by the plaintifficto a bill incequity all against him by the defendantables on an erold arold clear that before the delivery to the plantiff of one nor in question, there had been a barying ticheren of anair edg ade no. Woodin ugwikst Bukvok probabled bar

A SSUMPSIT against a horse dealer on the warran of a horse, Plea: non assumpsit. At the tri before Gurney B. at the Middlesex sittings, the plaint produced the examination on interrogatories of or Brampton, defendant's servant, who had taken the horse to the plaintiff. Plaintiff then asked him wh not to sell, but he knew about the horse; he answered, very little, th horse had just come up from the country and had receive another cough, but he the plaintiff could soon set that to right Plaintiff said he did not mind if it was only a cough, he knew how to deal with it, and then read over an tendered to Brampton a receipt containing a warranty which he signed. The horse soon after died of glanders On this receipt being offered in for the plaintiff to prove the warranty, Gurney B. thought that, Brampton, wa only authorized to deliver the horse and receive the money, and not to give a warranty, and nonsuited th plaintiff. soft on Jord offer

> F. Pollock moved for a new trial, saying, that it shoul have been left to the jury to say whether Brampto had authority to give a warranty, and whether he ha not informed the defendant of what he had dent so that the latter might be taken to have recognized th warranty given.

1834.
Wooden

v. Burford.

BAYLEY B.—The question is, whether or not the receipt signed by Brampton, the defendant's servant, with his declarations at the time he signed it, and delivered the horse to the plaintiff, is evidence to bind his master, the defendant. What is represented by a servant is not evidence against the master, unless the master's authority to make the representation appear. Here there was no evidence of any such authority. It is clear that before the delivery to the plaintiff of the horse in question, there had been a bargain between plaintiff and defendant for the exchange of horses, on the plaintiff also paying a sum of money to the defendant. terms do not appear; but it is clear, that all Brampton wasto do was to take the defendant's horse to the plaintiff, bring back the other, and receive the difference. When he signed the warranty, he might have supposed his master to have stipulated for those terms at the time of the sale, and that he need not mention it to him again. Now, it appears to me, that a warranty by one not intrusted to sell(a), but merely to deliver the article warranted, and bring back the price, does not bind the principal, without showing an express authority to warrant given by the latter. The plaintiff did not in this case make out any warranty by the defendant himself, or that he had authorized his servant to do so.

VAUGHAN B.—It is quite clear that there was a previous bargain, and equally so that the servant was sent to the plaintiff merely to deliver one horse and take back another, without authority to warrant.

BOLLAND & GURNEY Bs. concurred.

Rule refused.

⁽a) Secus, had the authority been to sell the horses and receive the Pice, Alexander v. Gibson, 2 Camp. 555; Helyear v. Hawke, 5 Esp. N.P.C. 12; Benk of Scotland v. Watson, t Dow's Rep. in Dom. Proc. 45.

1834.

WATSON against DELCROIX, Executrix.

Notice of inquiry may be stuck up in the and a copy left at defendant's sidence, by leave of the court, where the defendant found to be served with the previous proceedings, and the persons resident at her last place of residence refused to say where she now resided.

THE defendant not having appeared to a writ of summons, a distringas was obtained, and an appearoffice of pleas, ance entered under a judge's order, according to 2 W. 4. c. 39. A declaration was filed on 13 November, last place of re- notice having been given by sticking up a copy the office of pleas, and leaving a copy at the defendant's last place of abode, by leave of the court, under had never been Reg. Gen. Hil. 2 W. 4. No. 49. [ante, Vol. II. p. 346.] Judgment was signed for want of a plea. Butt moved that service of notice of a writ of inquiry, by sticking it up in the office, and leaving a copy at the defendant's last place of abode, might be deemed good service, en affidavit that the present occupiers of the house refused to tell where the defendant was; and the court granted a rule accordingly, unless cause were shown in a week.

Cullum against Leason.

Affidavit of debt for so much money, " for money lent and advanced, and interest thereon," is bad.

Quare, is a defendant, arrested in a wrong christian name since S & 4 W. 4. c. 42.

c. 11., entitled to be discharged on motion?

Rule had been granted for discharging the defendant out of custody of the sheriff of Staffordshire; first, because he had been arrested by the name of Henry Leeson, a name by which he was not known. instead of Thomas Henry Leeson, by which name the was baptised: and secondly, because the affidavit of debter was for "9201, and upwards, money lent and advanced and interest thereon." Cause was shown, first, that no doubt was suggested of the identity of the party the defendant might have compelled the plaintiff take end the misnomer in the declaration, by inserting the ht name, at his own costs, as provided by 3 & 4 W. 4. 2. a. line sedondly that as by s. 29. of that statute, iry may now allow interest on money lent, an arrest ir be made for interest and In support of the trule, sale and disther it. Coleman (c) was cited; where the lindges were of opinion that the amount of the ses note stied on should be specified because part of valebte might consists of einterested That :: shows a idiff to have no right to arrest for interest, and staden for 4 M. 4 or Ale, from day operation. The bet continted to the huthority of the case cited, ding, that they werd not aware of any decision that a their be held to bein for interestinand that tills to 4 last at 148. pitterest could not be recovered on money wishend allother oct does is the permit the fury to give terests if thisy think him. They finally made the rule brought phi the second i point, without costs, doubting hother on the first they had power paince the statute ited, to interfere in a summary way, the party not zing driven to a plea in abatement.

> manar are established the second (a) Ante, Vol. III. 593.

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Light of Dear Some Water 1

TME had been given to plead in a town cause on A defendant the usual terms, including that of taking short to take short bound is not bound

to take short

which executing a writ of inquiry. When a defendant is entitled to fourteen day notice of anguiry, and requives an eight days' notice only, he should return it included, in order to prevent expense; and where he did not do so, and let six any hand the eight elapse, before he gave notice of motion to set aside the proceedings for irregularity generally, without pointing out what it was, the inquiry was st side, but without costs.

1834. CHLLUM υ. LEESON.

STEPHENS

V.
PELL

allowed, notice of executing a writ of inquiry in eight days after it was served, was given and executed accordingly; notwithstanding two days before the execution the defendant had given notice, that if it was executed he would move to set aside the proceedings for irregularity, but did not state the irregularity. A rule was afterwards obtained accordingly, on affidavit that the defendant lived in Northamptonshire, sixty miles from London. The affidavits on the other side stated, that it was the practice for an attorney of a defendant residing more than forty miles from London, to naturn a too short notice of inquiry, that the defeadant, had, not done so, and that the writ of inquiry was lodged, and the plaintiff's witness had come to London at the time the notice to stay proceedings was served. Also that the defendant's residence was not known to be forty miles from London. Cause was shown, that the order for time to plead on the usual terms compelled the defendant to take short notice of inquiry; that at all events he should have given notice to stay the proceedings before the inquiry was lodged, and the expense incurred; and should have disclosed the nature of his objection. To show that his not returning the notice was a waiver of the irregularity, Rochfort v. Robinson (a) was cited. In support of the rule it was said that the defendant lived in Northamptonshire, more than forty miles from town, nor did the plaintiff show that at the time of serving the writ or notice he lived within that distance, but had since removed without giving notice to the plaintiff, so as to come within the case cited. Now by Reg. Gen. Hil. 39 Geo. 3. (b), fourteen days' notice shall be given of executing writs of inquiry, where the venue is laid in London or Middlesex, and defendants reside above forty miles therefrom. The order

⁽a) 12 East, 427.

⁽b) Scace. Manning's Exch. App. 224; 8 Pri. 503; Tidd. 9th ed. 577.

take short notice of trial does not include taking ort notice for executing a writ of inquiry. At does, t appear the general practice to between short notices inquiry; but if it be so, the plaintiff's previous irregulity was not waived by the defendant's neglect to imply with it.

STEPHENS 2. Pels,

Per Curiam. A party under terms to take short otice of trial, is not also bound to take short notice of nquiry. By the general rule cited, the defendant was a strictness entitled to fourteen days' notice. Had the addavit for the plaintiff stated in a satisfactory manner, that his attorney believed the defendant to have resided within forty miles, and that he had been served within that distance, that might have been such an excuse as would have enabled us to mark the irregularity with more lenity. The execution of the writ of inquiry should be set aside without costs, because the defendant, after receiving the notice of inquiry, should have given early notice of his intention to move in order to prevent further expense being incurred; but he bave no notice till two days before the inquiry was to be executed, and did not then state the nature of the irregularity. The master informs us, that if a party entitled b'fourteen days' notice receives an eight days' notice. the usual course is to return it, as the place of his residence lies peculiarly in his own knowledge. Her Follett in support of the rule, Humfrey against it, many sile is consists the grate

Rule absolute without costs.

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1834.

for a new trial after a trial before a shorth, there is corfined . Ire khoid to the mettil's notes as writed in affidavit, without permuting him to go into facts adult Johnson against Wells adio ni

A motion for a new trial of an issue tried by a sheriff or other inferior judge, under 3 & 4 Will. 4. c. 42. s. 17. should be made on producing a copy of the sheriff's if the rule is granted, it will

 $\mathbf{A}^{\mathbf{N}}$ issue having been tried before the sheriff of Lordon on a writ of trial under 3 and 4 Will. 4. c. 42. s. 17., the plaintiff had a verdict, and a rule for a new trial having been obtained on the notes of the secondary, certified by his seak it was objected on showing cause, that the rule was not drawn up on reading any affidavit, which it was the practice to have in moving to set aside writs of inquiry: Per Curjan-The act cited does not by affidavir, or place the sheriff of a county, or judge of a court of record for recovery of debt therein, to whom a writ of be discharged. trial may be issued, in the situation of a judge of the superior courts, so as to enable a motion for a new trial to be made on the statement of counsel, as after a trial at nisi prius. He stands in the same situation as on the executing a writ of inquiry; he cannot give leave that a verdict shall be entered by this court for either party; the motion can only be for a new trial, and should have been made on an affidavit, verifying the under-sheriff's notes. No such affidavit appears here, nor any affidavit of the facts; but as this is a new act, and the defendant may have been misled, the sheriff may move again on proper affidavits, on payment of costs and bringing money into court. Rule discharged. Stammers for, R. V. Richards against the rule. the inaging it of the excitation was

> BOLLAND B. afterwards announced the resolution of the judges, that in order to save expense, motions for new trials of issues tried before the sheriff &c. should be made on producing a copy of the notes of the shering or other judge, verified by affidavit; and in Hellings V. Stevens, May 2, 1834, on showing cause against a rule

for a new trial after a trial before a sheriff, Parke B. confined Archbold to the sheriff's notes as verified by affidavit, without permitting him to go into facts stated in other affidavits.

1834. **JOHNSON** v. WELLS.

HILL against SALT.

THE declaration was in debt, stating a bond in the A bond in the penal sum of 2604. Plea: non est factum. At the penal sum of 2001. was detrial before the under-sheriff of Staffordshire the bond clared on, as appeared to be in the penal sum of 200/. The under- had been 260/. sheriff refused to nonsuit the plaintiff for the variance. Held, that the He was not applied to to amend the declaration, under be amended 3 & 4 Will. 4. c. 42. s. 23. The plaintiff had a verdict, under 3 & 4 Will. 4. c. 42. with leave to move to enter a nonsuit.

Thesiger moved accordingly. This is a substantial an issue under variance, material to the merits of the case and prejudicial to the defendant in conducting his defence, for by it he may have been induced to plead non est factum. Then no amendment could take place under 3 & 4 Will. 4. c. 42. s. 23. Besides, as it is not clear that the power to amend extends to issues tried before the sheriffs, section 24. shows that he should have directed the jury to find the facts according to the evidence, and state them on the record, in order to the judgment of this court thereon.

Lord LYNDHURST C. B.—The sheriff, instead of nonsuiting for this variance, should have amended the record; but it would be useless to the defendant to end down the case to a new trial, as the amendment would then be made.

if the penalty mistake might s. 23., aud semble, by the sheriff trying a writ of trial.

Hill SALT.

BAYLEY B.—The case is clearly within the spirit of sect. 23. and the amendment should have been ... made.

> Rule refused (a). la ordei ALCOHOLD STATE

(a) See Witagel and others v. Bussell, 2 Marsh, 214; 5 Tount. 7.57, S. C.; Ross v. Punker, 1 B. & Cr. 358; Coles v. Hulme, 8 B. & C. 574, ... botton money are will a not a de marie and marie the to an experience of the children Service trafficiency of the est a Jacobs against Humphrey and Another.

The declarations of a sheriff's officer respecting goods seized by him under a fi. fa. in his possession at the time, are evidence against the sheriff, though made after its return day, and before any warrant issued by him to execute a venditioni exponas.

A sheriff must sell goods seized under a fi. fa. within a reasonable time, return of a venditioni exponas, or will be liable to an action.

ASE against the sheriffs of London for negligence in not disposing of goods seized under a fl. fa. within a reasonable time. The declaration, after averring judgment recovered, a fi. fa. issued and delivered to the defendants, and their return that the goods were winsold for want of buyers, averred the suing out a dealstioni exponas, and that defendants did not within ! reasonable time, or at any other time, expose to sale on cause to be exposed to sale the said goods &c., nor had they the money arising from the sale at Westminster, "&c., at the return day of the writ." The ft. fa. was issued 22d May, returnable 8th June, and defendant officer levied. On 7th June the sheriff returned goods unsold for want of buyers, and on the same day a ven ditioni exponas issued, returnable next day. No sheriff's warrant to the officer to execute that writ and before the appeared, but he did not give up possession till 10th June. It was proved that after the return of the fl. fa. and before service of the venditioni exponas, he admitted having seized to the full amount, but said that he would not sell, as defendants' attorney had undertaken to pay the demand. Verdict for the plaintiff for the sum indorsed on the writ, the subsequent expenses incurred by the plaintiff, and interest from the return of the

sheriffs to return the venditioni exponas, r. Leigh (a). Were they even now ruled hey could not plead to an action for a false recovery of the full amount of the damages in. Aireton v. Davis (b) decided that a case a sheriff before the return of the writ for under a fi. fa. with reasonable expedition; and v. Leigh was not cited, and there were a false return which would support that The declarations of the officer, after the e.f., fan were inadmissible in evidence; for dissolved his connexion with the sheriff. was not liable for his acts, no warrant to venditioni exponas having been issued to

ign.—The declarations of the sheriff's tted in evidence, were made while the writ as in the course of execution. Till the nade of the defendant's goods and chattels indersed on the writ, the writ is running, ution of officer and sheriff continues while the in the hands of the officer. The sheriff ct, without a nenditioni exponas, which is police alacrity when he delays or refuses to



JACOBS
v.
HUMBBERY
and Another.

1894

plaintiff by the medium of the writ, and was guilty oneglect to sell before the venditioni exponas.

Rule telubel.

The second of th

REID against Columns. (1). " Granting

THE desendant, plaintiff's landlord, held the gricopy of the agreement of demise. Plaintiff a pestedly applied to him for a copy, which was refused except on terms of admitting a tender, the handwriting of the parties, and consenting to a reference, 1111 161

Knowles obtained a rule to show cause why the defendant should not deliver a copy at his expense to the plaintiff, and produce the original at the Stamp One to be stamped, contending that the defendant ought pay the costs, as plaintiff had given him notice of the motion, in case he would give a copy.

Alexander, in showing cause, said that the defendant would give the copy, but objected to pay the cotts this application.

Per Curian—Those costs must be costs in the came for the defendant had no right to insist on those terms and had the motion been made before a judge at chest bers, it would have been granted as a matter of course if we gave costs it would encourage parties to come the court instead of the other less expensive remedy.

Rule absolute.

If one of the parties to a cause has the only copy of his agreement with his adversary, he avig bluode him a copy, when applied for, without imposing ... terms, or a judge at chambers will compel him to do so,

1834.

ROHRS against Sessions.

17.50 4 into

COVENANT for breaches of covenants to repair, In an action manure, &c., contained in the lease to the defend- for breaches of covenants in ent of a farm near Epping in Essex. Venue, Middlesex. a lease to Before plea Channell had obtained a rule for changing pair, &c., the the venue to Esser, and for liberty to plead in the venue will not be changed on mentione without prejudice to the rule. Notice had the ground been given to the plaintiff that the motion would be that it will be necessary to side on special grounds. The affidavits stated the call witnesses who have in the defence who live in while be necessary to call witnesses for the the county to which it is which it is sought to rethat the questions in the cause could not be so satis- move the factorily tried by the class of persons usually consti-that a fair ting Misdeleser juries, and could only be fairly tried in trial can only be had in that county, until the macra many pursuits after issue is a county, until after issue is a county is a county in the matter of the matter of the defence is a county in the matter of the county is a county in the matter of the matter of the defence is a county in the matter of the matter

cause, and would appear.

Knowles showed cause. The application is premature; for not only has issue not been joined, Weaverby v. Goring (6), but no plea has been pleaded. That is fatal where this motion is made on special Brounds, Cotterill v. Dixon (e).

⁽a) Essential in a motion to change the venue on a specialty, aute, Walter South the factor of the factor of the factor

^{- (}h) D.B. & Ga. Mill. F. R. These was no efficient of merits in that case. Examply it seems to have been compidered too late to mave to change the Taunt, an action on a specialty if issue had been joined. Stra. 854; 8 Taunt, 169; IT. R. 781, &c., cited 2 Archbold's K. B. Practice, 193; but in Weawhere v. Obring, the court held, that to change the venue in such actions the defendant must make it clear that he had a real defence and witnesses to call in suppost, of it; points on which a court could not possibly be istraed till issue joined.

⁽c) Ante, Vol. III. 705.

1834, ROHB5 v. SESSIONS.

Channell supported the rule. Weatherby v. Going was so decided because the affidavits did not develope the questions likely to be ultimately raised; whereasin this case the substance of the covenants substance special breaches of them alleged in the declaration baving been detailed, the court is already informedel the matters in dispute, and of the nature of the defeat to be raised. If the defendant suffers fludgment to go by default, damages must be assessed on the bretches **laid.** The distriction of the Sea risper potitionis esta المرأور والمراجعة والمراجع مروري harma tern it is in

Lord Lyndhurst C. B.—Before issue joined, the . nature of the question and the number and description of the witnesses required cannot be viscertained so as to enable a court to judge whether the want ought to be changed or not. For any thing that appear the plea may be at variance with the defence points at in the affidavits. It may be a release to the whole The defendant will not be injured, for he may reper this application at chambers after issue joined.

> Rule discharged · .. ' ' a (... 2017)9

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N. S. W. A

BRAITHWAITE, Executor of Ullock, against " Lord Montford.

Assumpsit for goods sold and delivered. of limitations. A writ of summons

SSUMPSIT for hams sold and delivered. Pless: non assumpsit and statute of limitations. At the Plea: statute trial before Denman C. J. at the Westmoreland assist the plaintiff having proved the goods delivered on 19th

tested within six years from the accraing of the cause of action was put in by plan tiff. It had been twice rescaled, and was not served until after the six years expired. No evidence was given by the defendant when either rescaling took page. Held, that the resealing gave effect to the original writ without amounting to a reissuing of it, and without making it necessary for the plaintiff to prove the date of the resealing, or more than the teste of the writ.

May 1827, put in a writ of summons tested 1st May 186, indomedicas served on: 1st June. Three seals meaned on it, and it had been twice altered; once in henime and description of the defendant, and again whis place of residence from Survey to Middleses Reitherdefendant it was urged that the plaintiff unust hew that the last rescaling had taken place within the in years, that the Chief Justice directed a verdict for be plaintiff paying, that the principle of compite site acts presumuntur applied. Dundas obtained a rule in Mi chacknas term to set aside the verdict, on the ground that ab the writ-could not be altered without rescaling, md:mist/have been served again after being rescaled; luced w. Middleton (o), that was a reissuing, and the plaintiff should therefore have proved it to have been respondent within six nyéars. He also produced un Milarit that the defendant had been applied to and that's prescipe dated 1st May was found on the Surrey they but mone ton the Middlesex file. " in the tree of t

1951.
BRAITHWAITE
v.
Lord
Montford.

F. Pollock and Wightman showed cause. Any objection to that, write on the ground of irregularity in the service, should have been made by the defendant by motion promptly after it occurred, whereas even at the trial he was not prepared to show that the write issued too late. If such matter could be proved at the trial it was incumbent on the defendant to do so. They were then stopped by the court, who called on

Dundas in support of the rule. The writ was in fact ressued on each resealing, though no dates are in this court subjoined on resealing. By 2 Will. 4. c. 39., the place and county of the defendant's residence must be named in the writ, which must be served in that county

1684 BRAITHMAINS Lord MONTEOND.

or within 200 yards of the boundaring of its much all bear date the day it issued. Bayley B. The nettern nothing about sealing writs. Israel y, Middleton ast shows, that by rescaling a writ it is not altogethers the nature of new process but may be served again Stamp duties on writs were then in force of Requisit them gave revived effect, to the original with by The second alteration of the defendant's residence from Surrey to Middleser made the writ an rentirely, nor one, for if the plaintiff intended to rely on the let Ma as the date of the first issue of the writ into Surrey. In should have continued that writiby align into Middle to Benson v. King (c). So by Reg. Gen. M. 3 Will, 4 No. 6. [Vol. III. p. 3.] a plaintiff may proceed by align and pluries writs, and that is the proper way where defendant described as living in one county is after wards found in another. He also cited Wester Fournier (b). ne analo y THE Master

BATLEY B. I entertain no doubt on this point. order to get rid of the plea of the statute of limitados the plaintiff must show when the writ was sued out. if it was sued out within six years, and was regula continued, it affords an answer to the plea. Un the old practice the writ was sued out within the years, and afterwards continued de die in diem, so as to prevent the operation of the statute. Here, we must take it for granted that the writ was sued out on the day of its teste, viz. 1st May 1833. The action mus be taken to have been then commenced (c). What has since occurred to prevent the operation of the wri from that date! Its original sealing was for Surrey

2 32 1 3134.

⁽b) 14 East, 591. (a) Tidd, 9th ed. 162.

⁽c) See Altton v. Undershill, ante, Vol. III. 427; Thompson V. Bal id. 873; Hillary v. Rowles, 5 B. & Adol. 460.

but as the defendant was improperly described, it was rescaled, and his residence being found to be wrong, it was again resealed and altered to Middlesex. Then effect was given to the writ issued on 1st May. The first rescaling gave authority to serve it in Surrey, the second in Middleser. No fresh præcipe was necessary, sail would only run for four months from 1st May.

Lord MONTFORD.

'Varietam'Bi-This was a writ of 1st May continued by two rescalings.

GURNET B. concurred.

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Rule discharged.

Baker against Wills.

THE Master to whom an attorney's bill of 2721. If less than a had been referred to be taxed, struck off 421. sixth is taxed off an attorin within 31. of a sixth, and refused to allow him the ney's bill, the costs of taxation. A rule having been obtained to allow allow or rem those costs, on the ground that one-sixth had not turn him the been disallowed in taxation; on showing cause Elwood ation; and v. Pearce (a) was cited.

BAYLEY B .- I am of opinion that the Master was off, the court fully justified in refusing the attorney his costs of costs. tration in this case. The motion was made at the peril of the attorney. It appears from Barker v. Bishop London (b), that by statute 2 Geo. 2. c. 23. s. 23., if a sixth has been deducted from an attorney's bill he must at all events pay the costs of taxation; if less than a sixth, the court has a discretion to charge the attorney or client with such costs, according to the

where very nearly a sixth was so struck refused the

⁽a) 8 Bing. 83.

⁽b) Barnes, 147; eited arguendo, 8 Bing. 83.

1834. Baker v. WILLS.

reasonableness of the bill or the contrary. Le v. Pearce, Tindal C. J. acknowledges that r adds, that if in a case where the court may ex discretion, the amount taken off the bill appre nearly to a sixth, it ought not to be called a officer of the court to allow the costs of taxatic authority applies to justify the course adopte Master in this case. Rule discharged with

Steer supported, Archbold showed cause ag rule.

Best against Gompertz.

When a defendant, against whom judgment had been signed on a cognovit, in which he agreed not to execution, of error notwithstanding: allowance of that writ of error was no supersedeas, and that he might be charged in execution notwithstanding. Semble othera release of errors.

NE of the terms of a cognovit was, that de should not bring a writ of error or delay e: on the judgment; however, after it was sig brought a writ of error, which was allowed. A motion to charge him in execution, it was sh bring a writ of cause that the allowance of a writ of error was a error, or delay to prevent the plaintiff from charging the defe brought a writ execution without notice of the allowance. v. Ramsden (a). For the plaintiff, it was said the Held, that the not sought to quash the writ of error, but to its operating as a supersedeas against the def undertaking not to bring it. The case was adi to inquire into a case of Davis v. Gompertz. be similar, and in which Parke J., sitting in t Court, remanded the prisoner to his former On the court being subsequently informed that wise if there is case there was a release of errors, Bayley ! "Prima facie a plaintiff has a right to charge fendant in execution, if he is not supersedable the allowance of a writ of error does not open supersedeas, where it appears to have been brot

delay, or against good faith... A release of errors is a different species of security operating at a different time. Here the plaintiff's only security is a special agreement; by the !defendant not to sue out a writtof error, or de any thing to delay execution; that affords an answer to the writ of error, without which the defendant must have been remanded to his former custoly. The defendant must be charged in execution as prayed. who we put the march pertury on a good

1834. Везт 7. GOMPERTZ.

REDIT against Lucock.

ASSUMPSIT on a promise to marry. The plaintiff A defendant withdraw his record at the last spring assizes for costs of the Suffolk, for which notice of trial had been given. On day for not the 9th day of Michaelmas term a rule misi was ob- trial pursuant timed by B. Andrews for taxing the costs of the day to notice and though the for not proceeding to trial, to be paid by the plaintiff plaintiff has when taxed, or deducted out of the costs due to him. subsequently Came was shown by Kelly that the motion, should obtained a have been made in the next term after the default signed final mde, viz. in Easter or Trinity terms, and came too judgment, if late on 11th November, as the plaintiff had obtained still in exist. wordict at the summer assizes, and signed final judg- ence from the ment on 7th November. In the King's Bench, signing having texted inal judgment and taxing costs are contemporaneous. his costs own h answer to a question by Lord Lyndhurst, An-fruits of execuwas said in support of the rule, that though final tion, have judgment had been signed, no costs had been in fact with some man to complete a some many assess much how -

may move for the cause is plaintiff's not obtained the

ter apage

Per Cutians (a)—There is no case to show that a defendant cannot apply for costs of the day, after final judgment, if the cause remains in existence. Now

21 Create of dealers

(s) Lord Lyndhurst C.B., Bayley, Bolland, and Gurney, Bs. YOL. IV.

1834. REDIT v. LUCOCK.

this cause is still in existence, the plaintiff not having been satisfied by the fruits of execution. These costs were clearly due at one time; they are interlocutor, parallel to and unconnected with those of final judgment, against which they ought to be set off, or paid to the defendant. The plaintiff is, in fact, benefitted by the delay to take the costs out of his pocket, for had the application taken place before, he would not have had costs to set off against them. Rule absolute.

FIGGINS against WARD and two Others.

If several defendants sued on their joint promissory note suffer judgment by default, it is sufficient to the rule to compute.

A LL three defendants having suffered judgment by default on their joint promissory note, the Court held that they had thereby acknowledged a joint easi of action, so as to be partners quoad hoc. Accordingly, service on one of them, an attorney, of the rule ! serve one with compute, by leaving a copy with him, and two other copies for the two other defendants, was held sufficient Halcomb in support of the rule.

Ex parte Thomas Roach Garratt.

A person who had been adnitted an attorney before 11 Geo. 4. & 1 Will. 4. c. 70. (23d July 1830,) and had taken out his certificate to practise in a court of great session in Wales, but

MANNING moved to inrol the name of Mr. Garrat on payment of 1s., in order to enable him to ptotise as an attorney of this court in actions against per sons residing in Wales, under 11 Geo. 4. & 1 Will. c. 70. s. 16. In order to show, as required by section, that he was a person who, at the passing that act on the 23d July 1830, was admitted an attorney, and was then practising in a court of great ession in Cheshire or Wales, an affidavit was read

had ceased to practise, and was not "then practising": Held that he was not entitled to be inrolled an attorney of a superior court under s. 16. of that act.

stating that he was admitted an attorney in a court of great sessions in 1823 and took out his certificate, but having married before the year expired, had since tensed to practise. [Bolland B. cited Ex parte Read(a).] There, a party who had been admitted an attorney in a court of great sessions in Wales, without having taken out a certificate before 23d July 1830, was held not entitled to be inrolled an attorney of the court of King's Bench under the above act, as not being then attally practising; whereas this applicant had taken out his certificate, and is within the equity and meaning of the statute.

1834.

Ex parte

GARRATT.

BAYLEY B.—The right here claimed depends on the express enactment of 11 Geo. 4. & 1 Will. 4. c. 70.

1. 16. by which persons who shall have been admitted attornies, and shall then, (viz. at the passing of that act, viz. 23 July 1830,) be practising in any of the courts of great sessions in Wales, shall be entitled, on payment of 1s., to have their names inrolled in each of the superior courts at Westminster, and be allowed to practise in such courts in all actions against persons resident at the commencement of the suit within the county of Chester or principality of Wales. As the present applicant was not "then practising" in a court of great versions he is not within the words of the act, and the court has no power to assist him.

Manning took nothing by his motion.

(a) 1 B. & Adol. 957. Hil. 1831.

1834.

A defendant in an excise information may defend in formà pauperis on an affidavit that he is not worth 51. over and above his apparel, and without certificate by counsel, that he has merits. But such a defend. ant is not entitled to a copy of the information, and can only have it read over to him by the officer, in order to his pleading then or at a future day.

The Attorney General against Dufi (Revenue Case.)

THE defendant had been served with notice pear to an information against him fo offences against the excise laws, and obtain to be admitted to defend in forma pauperis, an a copy of the information gratis, on affidavi was not worth 51. over and above his wearing Tancred for the Crown showed cause, that 3 & c. 53. s. 97. only extends to informations for against the smuggling acts, and does not apply informations; also that a certificate of meri by counsel was as requisite to defending as to formá pauperis. There is no instance of g copy of an information as prayed. Per Curi copy of the information having been furnish defendant, and the notice to appear being co terms too general to show what the offence cl how could the defendant swear or his couns that he had a good defence on the merits? In mon case of a plaintiff suing in forma paur defendant is put to inevitable expense by granted so to sue; on which account the cer counsel is required, besides the mere affidavit o As to allowing the copy of the information, t of the King's Bench before 60 G. 3. & 1 (s. 2. was, that the officer called up the defend after reading over the whole charge to hi him whether he chose to plead then or to tal do so at a future day. We will direct the clerk on the part of the crown, to attend for that to-morrow, and at another day, if requisite, to plea. Next day the officer having read the in to the defendant in court, he pleaded not guil plea was recorded (a).

(a) No defendant can defend in forma pauperis in a civil lock's Costs, 2d ed. 228; Barnes, 328.

Finch against Cocker.

1834.

A Rule was obtained for delivering up the bail- If it is made bond to be cancelled, on the ground that the a motion for lefendant's real name was Cocken, and not Cocker, in giving up the which he had been arrested. The affidavit in support be cancelled, of the rule was entitled Finch v. Cocker. Cause was that the defendant was hown, that it ought to have been entitled Finch v. arrested by a Cocken, (sued by the name of Cocker). And that in wrong name, Show v. Robinson (a), the court said, the defendant should be enhould have described the cause in the affidavit as he defendant's ontended it should have been described in the writ. The court refused to suffer a renewal of the motion on name of" (the n amended affidavit, saying, the motion sought to stablish a strict and unimportant objection, while, on he other hand, the objection to the title of the affidavit ras valid. Rule discharged without costs, the defendint being allowed four days time to put in bail. Dowling for, Barstow against the rule.

the subject of right name, wrong name).

(a) 8 D. & R. 423.

HERBERT and Another, Executors, against PIGOT, Bart.

A SSUMPSIT by two of four executors of Herbert, Two of four deceased, to recover 90l. for goods sold and de-proved the wered, and work and labour by testator. The defend- will, and sued paid into court 271. 15s. 3d., and pleaded the general and delivered, sue to the residue. The plaintiff had served the defend- and work and labour done by as gamekeeper till his own death, and received money the testator. such on account of fish, &c., sold for his master. released to the Six weeks before his death he delivered an account to defendant,

for goods sold The other two who pleaded the release

Pois darrein continuance. Held, that before the court would take the plea off the file, the plaintiff must make out a case of fraud.

HERBERT v.
PIGOT.

the defendant in their usual course, in which he sta 40l. 17s. to be due to him from the defendant. afterwards delivered to the defendant two other counts, the one stating that 55l. 3s. 7d., and the ot that 13l. 1s. 9d. was due from himself to the defend. He appointed the plaintiffs, his relatives, and the fendant's butler and cook, his executors. The two la did not prove the will or join in this action; but non-joinder was not pleaded in abatement (a). Attime the defendant was called on to plead, he had r laid the account of the 55l. 1s. 7d. stated by tests to be due to him, and paid money into court acco ingly. Afterwards, and after the cause was sent de to trial, he pleaded puis darrein continuance, a rele by the two executors who had not proved the v A rule having been obtained by Busby for sett aside that plea and for giving up the release to cancelled, the releasing executors swore, that in e sequence of the plaintiff's refusal to refer the car they released the action without the defendant's s citation or interference. The defendant's affide stated the same fact, and that the testator had other claim on him than 40l. 17s., and that having a found the account for 55l. 3s. 7d., he had commen an action against the executors for the balance due him.

R. V. Richards showed cause for the defends Had the release been obtained by fraud, the plaint might have replied that fact, and it might have be tried by the jury again; if in point of law the executors who have not proved or joined in the action cannot release, that might have been tried on demand But if the defendant had a right to plead this release

⁽a) See cases collected, 1 Chitty on Pleading, 4th ed. 12, 13.

the court will not take the plea off the file unless fraud is shown. They did so in Innell v. Newman (a), because the release by the husband of the suit, brought by his wife as executrix in his and her names, was a gross violation of the very terms of the deed of separation, by which he secured to her as separate property all effects which she might acquire, or which by any representation she or he in her right might be entitled to, and covenanted to do no act to impede the operation of that deed, but to ratify all proceedings to be breaght in his or their names for recovering such real and personal estates.

1834. Herbert v. Pigot.

Busby contral. The questions are, first, whether the where was obtained by the defendant in fraud of the plantiff's right of action; and secondly, whether the defindant was, in point of law, in a condition to plead a where by strangers to the record? [Bayley B. They and not strangers in interest.] The objection on the mend may be raised on error. It is enough that the rewould work injustice, first, for want of consideraion, and secondly, because the plaintiff's widow, who is admitted to be the only person beneficially interested, would be driven to a remedy against the co-executors. La Mountstephen v. Brooke (b), several plaintiffs having med as trustees for the creditors of an insolvent, a please by one of them without consideration was puis darrein continuance; but the plea was maide without costs, on the terms of indemnifying he plaintiff who had released, his name having been wed without his consent. This release was a devaswit, and Bayley J. rests his judgment on that ground in Innell v. Newman. [Bayley B. The husband there did not assign as a reason on affidavit, that the debt

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⁽a) 4 B. & Ald. 419.

⁽b) 1 Chit. R. 390.

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was not really due, and there was no colour for the release.]

BAYLEY B.—A release may be most unjust, in which case this court would interfere; but it may also be the means of furthering justice, and will then be suffered to remain on the file. There would be a good colour for it here, if the releasing parties had a well-grounded conviction, that no more was due to the testator than the sum paid into court; and if the plaintiffs, being certain of costs in case of success, and not being liable to pay them in a contrary event, sue a defendant who incurs the risk of paying all costs (a). This being an action by two out of four executors, the defendent pleads a release given spontaneously by the other two. executors. They ought to have sued, but as no objection has been taken on the ground of non-joinder, the release must be taken to stand on the same footing as if they had been co-plaintiffs. Jones v. Herbert (b) decides, that a plaintiff who applies to set aside a release given by a co-plaintiff, and pleaded puis darrein continuance, must establish a very strong case of fraud. such case appears here. The accounts delivered by the testator before his death, state a balance in favour of defendant. The defendant having mislaid the material account in his favour, calculates on the remainder. that 271. and a fraction is due to the plaintiff. That sur he pays into court, and offers to refer. This offer being refused, the co-executors thinking enough has been paid, give the release. The action may be oppressiv€ and the release fair. We ought to leave the plea 🗢 the record, in which shape it may be defeated, if fact fraudulent.

⁽a) The action was brought before 3 & 4 W. 4. c. 42. s. 31, ants, p. ≥ came into operation.

⁽b) 7 Taunt. 421.

VAUGHAN B.—In Arton v. Booth (b), the court of C. P. held, that if one of two plaintiffs release a defend-intafter action, but without the other's consent, the court will not set aside the release, unless fraud is clearly made out. It is here said, that the releasors are not parties to the record. They ought to have been so, and are intrested in its subject-matter, and in seeing that the aside are not squandered. As no ground exists for imputing fraud, we ought not to interfere.

1834.
HERBERT v.
Pigot.

became B.—The question of fraud might have been raised in another form before a jury, as it appears that so far from any fraud on the part of the defendant, the release was given spontaneously, and from a conviction that defendant had paid more than warder. The rule must be discharged.

Gerney B. concurred.

Rule discharged without costs (b).

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⁽e) 4 B. M. 192.

⁽b) See also Dyer, 236; Bayley v. Loyd, 7 Mod. 250. Alner v. George, 1 Compb. 392.

CASES IN HILARY TERM

GILLETT against HILL and Another.

TROVER against wharfingers to recover the of fifteen sacks of flour. At the trial before Lyndhurst C. B., at Guildhall, the following appeared: Orbell, a country miller, having d bill on the plaintiff, a flour dealer, which An order signed by O. accepted, gave him an order on the de for the delivery by the his wharfingers, for twenty sacks of flour defendants, wharfingers, of tiff's carman presented Orbell's delivery twenty sacks twenty sacks, at the defendant's counting-ho of flour to the plaintiff, (the foreman answered that they had no mor party named sacks to spare, and that he might have in the order) was lodged carman took the five sacks, having lodge with and acwith the foreman, who filed it in the v cepted by them in the applying the next day for the rest of the usual course of business; fendant's foreman said, you shall have i they at the same time deget some; and to another application, claring they after, answered, that the defendants had but five sacks to spare, The defendants' witnesse which the party might mination, would not swear that the have, and he sacks of other flour of Orbell's on received accordingly. time the order was lodged, but On application for the was, it was appropriated by other rest, they deorders, were, however, produced clined to deliver it. On It was also sworn, that the ple trover brought against them lodged an order for five sacks, by the Party not produced. For the defend named in the any other flour that as the fifteen specific sacks in the defend. order, it did not appear that he knew ants' possess

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The j that O. had flour had been previously appropriated by O. nour man useen previously appropriated by U. Ine J had accepted the order generally, and gave a verdict the fitteen sacks. The court refused to disturb the the fitteen sacks. the fitteen sacks. The court retused to disturb the mitteen sacks. The court retused to disturb the maintainable, as the defendants had not limit their has maintainable, as the defendants had not limit their has maintainable, as the defendants had not limit their has maintainable, as the delivered to the plaintiff.

**The court retused to disturb the in their had not limit selected or appropriated by the wharfingers, no property in them passed to the vendee to enable him to maintain trover. For the plaintiff it was answered, that the defendants' acceptance of the delivery order for twenty sacks, was a virtual appropriation of that quantity to his use, and that the subsequent demand and reissal were therefore evidence of a conversion. The lamed Chief Baron left it to the jury to say, Whether there was an acceptance by the defendant of the order for twenty sacks? The jury found there was, and gave a werdict for the plaintiff for the value of the fifteen sacks.

1884.

GILLETT

v.

HILL

and Another.

A rule having been obtained for a new trial,

John Williams showed cause. The rest of Orbell's flour on the defendant's wharf was said to be appropriated by other orders, admitted to be in the defendant's possession, but not produced. [Lord Lyndhurst C. B. The case went to the jury on the credit due to the statement, that the appropriation had taken place by those orders which were not produced. That is the bole case, and the finding of the jury on it disposes the law.] The Court then called on

Bompas Serjt. and Hoggins to support the rule. The remaining fifteen sacks were to be selected, not by the plaintiff, but by the defendants from Orbell's other flour, as only five were delivered to the plaintiff. Then trover will not lie for fifteen specific sacks, while unspropriated to the plaintiff, the property not having passed out of Orbell. Hanson v. Meyer (a), Rugg v. linett (b), Austin v. Craven (c). In Busk v. Davis (d) Lord Ellenborough and Le Blanc J. say, if something was to be done to ascertain the individuality of the

⁽a) 6 East, 625. 614. Starch case. (b) 11 East, 210. Turpentine case.

⁽t) 4 Taunt. 644.

⁽d) 2 M.& S. 397.



1854.

GILLETT

v.

Hrit.
and Another.

thing to be delivered, the order to deliver entered in the wharfinger's books did not operate as a complete delivery. [Vaughan B. That case turns on the necessity to weigh the mats, in order to ascertain the quantity to be delivered.] Weighing was only one circumstance. [Bayley B. Where the article is to be weighed, the property does not pass to vendor till the weighing takes place, and then only in the part weighed.]

Lord Lyndhurst C. B.—It appears to me that the question of law sought to be raised in this case, has been decided by the facts found by the verdict. The order presented to the defendants on the plaintiff's behalf was this: "Mrs. E. Hill & Son, please to deliver to Mr. Gillett twenty sacks of household," and was signed by Orbell. That order was lodged with and filed by the defendant in the manner that orders accepted generally were filed by them in the usual course of business. The jury did not believe that it was not accepted generally. was, however, evidence that on the same day another order was lodged for five sacks ex. 20: but it was not produced by the defendants, on whose files it would have been with the other order for the twenty sacks; nor did they shew it to have been lost; on the other hand, the acceptance by the defendants of the order to deliver Orbell's twenty sacks, afforded evidence that they had that quantity of his on their premises at the time, without any distinct proof on their part that they had more of his flour than those twenty sacks; or that if they had, they were appropriated to other orders. Then if the jury believed that Orbell's flour was not appropriated by any other orders of his, the point of law does not arise: but, suppose that the defendants had fifty sacks of Orbell's flour, and accepted an order to appropriate

IN THE FOURTH YEAR OF WILLIAM IV.

293

wenty of them to the plaintiff, could not he bring rover for the twenty? (a)

GILLETT
v.
HILL
and Another.

BAYLEY B.—The order to the defendants being general to deliver twenty sacks of household flour to the plaintiff, they must have known whether they had more or less than that quantity; and if they had less, might have accepted the order for the actual quantity, by indorsing it accordingly. That course would have prevented the contradictory statements of the witnesses; but there was no evidence of their acceptance to a limited extent only and not generally. The verdict for the plaintiff appears to me to be consistent with the evidence. On the other point, as to the form of action, I am of opinion that the action of trover was maintainable. The cases alluded to for the defendants may be divided into two classes; one in which, though a bargain and sale of the specific goods has taken place, yet as something remains to be done to them by the seller, the property remains in him till that is done, and does not pass to the vendee, so as to enable him to maintain trover. The other class is where the bargain is for a certain quantity of goods ex a larger quantity(b). and the vendor has a power to select what part he chooses to deliver, his ability to deliver that quantity not being at an end, e. g. by fire, &c. For example, if the seller is to deliver a quantity of oil, the bulk of which is to remain in his possession, there, before a division takes place by the vendor, no individuality is ascertained in the part sold, so as to sustain an action of trover or assumpsit for goods bargained and sold by the vendee (c). But those cases do not bear on the

⁽a) See Jackson v. Anderson, 4 Taunt. 24.

⁽b) Buskv. Davis, 2 M. & S. 397; Shepley v. Davis, 5 Taunt. 617.

⁽c) See Wallace v. Breeds, 13 East, 523; Whitehouse v. Frost, 12 East, 614; White v. Wilks, 5 Taunt. 176; 1 Marsh. R. 258. S. C.; Winks v. Basell, 9 B. & Cr. 372.

GILLETT

V.

HILL

and Another.

present question. The order of Orbell was to deliver twenty sacks to the plaintiff, nor did it appear that the plaintiff knew Orbell had more flour there than the twenty sacks. The acceptance of that order by the defendants in the usual manner, and without restriction or saying they should select what sacks they should deliver, admitted that they had those specific sacks of flour of Orbell's, which they were content to hold for or deliver to the plaintiff, according to Orbell's order. Their subsequent declaration that they had not the twenty sacks, or twenty sacks unappropriated, is at variance with their previous acceptance of the order. That acceptance having been general, the property in the twenty sacks passed from Orbell to the present plaintiff, and this action of trover is sustainable.

VAUGHAN B.—The defendants attorned to the delivery order, and acknowledged the plaintiff's right to call on them for twenty sacks when he pleased. There is no satisfactory evidence that they had more than twenty sacks of Orbell's flour. But if they had, and had required time to select which sacks they should deliver, or appropriate to the order presented on behalf of the plaintiff, it might have been questioned whether before that appropriation trover would lie. But here their refusal to deliver the residue of the flour after accepting the order generally, and delivering part, we sufficient evidence of a conversion by them.

GURNEY B. concurred.

Rule discharged.

1884.

A quantity of

MILES, Assignee of FAUX, a Bankrupt, against GORTON and Others.

TROVER for hops, sold by the defendants to Faux, before he became bankrupt. Plea: general issue. chased from The cause came on to be tried before Gurney B. at the second sitting for Middlesex, in Easter term the invoice of 1833, when a verdict was found for the plaintiff for 221.7s. 6d., subject to the opinion of this court on the words "on following case.

On the 16th April 1831, Faur, who resided then in the seller's at Birmingham, contracted with the defendants, who and a bill acare hop merchants, resident in London, for the purchase of, and they sold to him twelve pockets of afterwards Kent hops, and ten pockets of Sussex hops; and on given them at their request, the 24th of the same month he received at Birming- which they Am. from the defendants, an invoice of the said hops, getting it diswhich the following is a copy.

"Ir. Richard Faux. London, April 23d, 1831. that bill, part Bought of Gorton, Johnson, & Co. hop merchants, or the nops was delivered, Aldermary Church Yard, Watling Street.

12 pockets hops, Spring Kent 1826, (here the weights of £. s. d. order, to his each pocket were stated) making 18cwt. 2qrs. 11lbs.

pockets do. Norris, Ton Street 1830, (here the weights,

&c. were stated as before) making 16cwt. Ogrs. 1lb. 132 1

£209 6

" At Rent."

at maturity. that though the sellers might not have a right, while the bill remained outstanding, to part with the hops remaining in their possession, the assignee of the orginal buyer could not maintain trover for them without actual payment of the plan agreed on, as well as of the warehouse rent, he having only the right of property, without that of possession.

hops was purthe defendants in April 1831, which contained the rent." The hops remained warehouse. cepted by the buyer was indorsed on counted. During the running of in pursuance of the buyer's sub-purchaser, who paid the 76 5 0 warehouse rent charged by the sellers. 6 Afterwards, O and before the bill became 6 due, the original buyer became bankrupt, and it was

dishonored

MILES
v.
GORTON
and Others.

The said Faux at the same time received from the defendants a letter, the following of which is a copy.

"Sir, Above we hand you an invoice of your obling order to Mr. Hurst. The quality of each lot a sample, and we are sure will please you. We show think the sudden dissolution of parliament will create decided improvement in the hop market. Your furth commands will oblige, &c."

which is (Signed by the defendants.)

It appeared in evidence on the trial, and was found by the jury, that a certain bill of exchange 2091. bearing date in May 1831, drawn by the defen ants, payable to their own order, on the said Fas and accepted by him at three months after date. given at the solicitation of the defendants, in payme of the hops contained in the said invoice of 24th Ap-This bill was indorsed by the defendants, and d counted by them at the bank of Lubbock & Co. o 15th June 1831; but it was not paid when due, th said Faux having in the meantime been declared a bankrupt. All the hops except the samples delivered remained in the warehouse of the said defendants, until as hereinafter mentioned. On 25th May, the said Faux sold to one W. Whitehouse the ten pockets o Sussex hops which formed one of the lots, and par of the hops contained in the said invoice. A few day after this sale the said Faux wrote to the defendant requesting them to transfer the ten pockets to M Whitehouse, and send him samples of each pocket: which the said Faux received from the defendants letter in answer, the following of which is a copy;

"Dear Sir,—Herewith you will receive samples, hops which we have transferred agreeably to order, &c. &c.

London, June 4th, 1831." (Signed by the defenden

On 4th June 1831, the hops so purchased by the 114834. said W. Whitehouse were transferred by the defendants, by the said order of the said R. Faux, to the said W. On the 2d July following they were forwarded to him at Birmingham by the defendants, and he paid them on demand 4s. 2d. for warehouse room for the same for one month. The said R. Faux having complained to the defendants of the quality of these hops sold to W. Whitchouse on 29th June 1831, received from the defendants a letter with reference thereto, from which the following is an extract :---

"When the hop market is heavy every purchaser is a complainant, and so it appears the buyer of your Norris is; the lot is a very even one, as much so as you will find in general. We sent you samples of each pocket, and we are sure you would have complained, if the average was not correct. penuaded your buyer has no cause to object to fulfil his contract, if you sold the lot by your samples. We advise you not to listen for one moment to such an objection, which is only made because the market is dull.

London, June 28th 1831." (Signed by defendants.)

On 6th July, the said R. Faux became bankrupt. The twelve pockets of hops which formed the other lot, and for the recovery of which the present action is brought, were in the warehouse of the defendants at the time of the bankruptcy of the said R. Faur, and have no continued ever since. The plaintiff is the assignee of the estate and effects of the said R. Faux. A'demand by the plaintiff on defendants of the hops, and an offer by him to them to pay them the warehouse rent for same, proved, as also a refusal by the defendants to deliver them up, on the ground of their being their property. The question for the decision of the court is, whether, MILES
v.
Gorron
and Others.

under the circumstances stated, the plaintiff as such assignee, is entitled to recover the value of this opinion pockets of hops. If the court should be of this opinion the verdict to stand; otherwise a passing of the verdict to stand; otherwise a position of the verdict to stand to the verdict to the ve

Rollett for the plaintiff. The assignes is entitled to recover the value of the twelve pockets, because the defendants, the sellers, by charging the bankrupt, in the original invoice with warehouse rent, did in the execute a delivery of them to him as vendee, taking his acceptance; in payment. That part of the defendants warehouse which was occupied by these hops was the of the vendee, so that their transitus was at an end and the defendants could not have stopped them in the warehouse rent thus stipulated to be charged man paid or not makes no difference; part however, was fact paid by Whitehouse.

The contract for both lots of hops was entired and part has been transferred and delivered by the defendants to the vendee's order during the time the bill was running. [Bayley B. The question is, whether the defendants as sellers had a lien for the price of the whole of the hops remaining in their warehouse. "at rental and if they had, whether it was broken by the delivery of part? (a). In Hurry v. Mangles, the warehousement had actually received the warehouse rent (d). In Blogger v. Morley (e) there was an actual part-payment for the goods. A stipulation for paying warehouse rent may make this difference, that it might create an additional lien for the rent besides the price. The circumstance

⁽a) 1 Camp. 452, (b) 2 id. 243; but see Bloxam v. Sanders, 4 B. & Cr. 950, as cited 9 B. & Cr. 376.

⁽c) See Bunney v. Poynts, 4 B. & Adol. 568.

⁽d) So in Winks v. Hassall, 9 B. & Cr. 873. (e) 4 B. & Cr. 951.

of the bill outstanding in the hands of a third person might suspend the seller's hen during the time it was running, and might prevent the defendants from selling the hops to another person; but will the assignee of the buyer, whose right accrues in the interval, be entitled to the for them?] Part-delivery may not destroy a lien on the other part for the price, but the delivery of part my be such as would amount to a constructive delivery of the whole in point of law, so as to put an end to the where right to stop the rest in transitu, had it before existed; Slubey v. Heyward and Others (a). This transwith however differs much from part-delivery, for the contact is, to buy 22 pockets to remain in the vendor's withduse at rent for the whole. The buyer exercises control over them by selling a part, which are delivered w his sub-wendee, who pays the rent for that part. Had the whole been sold, they must have been delivered, as all, though of different qualities, were sold by on entire contract at a rent for the whole. [Bayley B. In Hurman v. Anderson, the goods when sold were in the warehouses of third persons, wharfingers, who delited the sellers with rent accordingly. buyer's depositing the delivery order with the wharfingets, they immediately transferred the goods to his and debited him with warehouse rent. What been the seller's warehouse became that of the bager. Here, the seller has control over the warehouse, and though the vendee may have a right to receive the goods on paying the rent, I think such payment in respect of part, while the rest remained in the seller's hads, makes no difference as to the property in the latter. Though the lien of the seller might be suspended during the time the bill was running, so that the buyer might then have demanded the hops, it

MILES

V.

GORTON
and Others.

MILES
2.
GUETON
and, Others.



would revive as against him if no demand was made until after the bill was dishonored, but not against his assignee.] In Blowam v. Sanders (a), it was held. that though a vendee of goods acquires a right of property by the contract of sale, he does not acquire right to possession of the goods until he pays or tenders the price of them, and could not support troyer until the right of property and possession concur. But the circumstances of that case differ widely from the present. There all the acts of sale were by the original vendor by assent of the buyer Saxby, and no warehouse rent was stipulated for before the settlement of accounts; whereas in this case, the sale of part which took places was by the vendee to a third person, without intervention of the original vendors, who acceded to it and received the warehouse rent, which had been stipulated for in the first instance. Again, as the bankrupt's acceptance was here taken for all the hops, was discounted, and outstanding in the hands of a third party, who migh have sued the acceptor before he became bankrup that was as against the sellers, the defendants, su stantially a payment to them so as to strip them of a right to retain the hops; Bunney v. Poyntz (b). That outstanding acceptance would be a defence to an action for the price by the vendor; Kearslake v. Morgan (c). In Horncastle v. Farran (d), the owners of a ship having by charter-party a lien on the goods for their freight till the delivery of good and approved bills, took a bill offered them as payment, but disapproving of it would not relinquish their stop on the goods, yet afterwards negotiated the bill. That negotiation was held to amount to an approval of the bill, and to a relin-

⁽a) 4 B. & Cr. 941. (b) 4 B. & Adol: 568.

⁽c) 5 T. R: 513. Hil. 1794. Bayley B. "That was the first eneq I giver argued."

⁽d) 38. & Ald. 497.

quishment of hen on the goods. Mr. Justice Bailey there said, "If Campbell (the freighter) had consented expressly to this negotiation, and yet had agreed that the plaintiffs should retain their lien on the goods, he would of course have been bound by that agreement; but that was not the case, and if the plaintiffs negotiated the bill without such express consent on his part, it seems to me that they gave up their hen on the goods. If we were to hold otherwise, the consequence would be this: that Campbell would be prevented from obwining his goods in order to enable him to take up the bill, and yet he might be arrested on it and compelled to pay it. That would be a great inconvenience and hardship, which ought not to be imposed on him without his express consent." Again, in New v. Swain (a) the same learned judge said, "Where the owner of goods sells on credit, the buyer has a right to immediate possession; but if he suffers the goods to remain until the period of payment has elapsed, and no payment in fact is made, then the seller has a right to retain them." In no other case where the goods sold have remained in possession of the seller, did the vendee exercise control and ownership over them, by reselfing and delivering them with vendor's consent out of the warehouse of the latter. Then the personal credit of the vendee was agreed to be taken in lieu of the lien, and the assignee of the buyer, on tendering the warehouse rent, was entitled to take the remainder of the hops from the Vaughan B. Winks and possession of the seller. another, assignees, v. Hassall (b) is nearly similar in circumstances. Bayley B. That was a question whether the assignees of the buyer of two pipes of wine then in a bonded warehouse, could recover one of the Pipes which had not been delivered without first paying

MILES
v.
GORTON
and Others.

^{(4) 1} Danson & Lloyd's Mercantile Cases, 193.

^{(6) 9} B. & Cr. 372.

MILES

V.

Gorron
and Others.

the duty on both, as the bankrupt had stipulated to and the court held that they could not. Parts I was of opinion that the vendors had not waived their lien by giving a delivery order for the whole, it not having been acted on as to one pipe before the buyes insolvency.]

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Lloyd contra for the defendants was stopped. In was stated on the margin of the special case that the defendants would contend that there had been no delivery, actual or constructive, of the twelve pockets of hops which remained in their possession; and that the insolvency of the buyer they had a right to require them for the price.

BAYLEY B. (a)—I am of opinion that the plaintiff is not entitled to recover. This action is brought by the assignee of a bankrupt to recover the value of cortain goods bought by that bankrupt; and the question is whether the assignee, who stands in the place of the original vendee, would be entitled to possession of them without paying the price agreed by the latter to be given to the vendors. The general rule is, that if goods are sold, without stipulating at the time for particular terms as to payment of the price or time of delivery, though every thing the seller has to do with them is complete. and the property vests in the buyer so as to subject him to the risk of any accident which may happen to the goods (b), and the seller is liable to deliver them whene, ever they are demanded on payment of the price, atil there results to the vendor, in respect of his original ownership, a right to keep possession of the goods he pays the price agreed on for them. Therefore. in the interval before the bill was given for the price.

⁽a) Lord Lyndhurst was sitting in equity, Bolland B. at nist prinding

⁽b) See Tarling v. Baxter, 6 B. & Cr. 360.

there is no doubt that the seller might have retained as hope till satisfied for the price. After the bill was given for this whole price, the condition of the parties waried to a certain extent only? It gave the buyer. before has insolvency; control over the whole of the hops, and during the period of its running he might have insisted on the whole being delivered to him or he order. Thus, when he gave Whitehouse the de-Why vider for the Sussex hops he had a right to do Whit is consistent with Hurry w. Mangles, for he becarge there outstanding had been taken by the Wadows, "the original holders, as a valid security." Those Whickets were actually delivered according to the right to direct that delivery which the buyer had before this insolvency. However, they were not delivered under with the time tartes as would make an incomplete de-Buy of them a delivery of the remainder (a); but the divery was pro tanto only, leaving to the vendors the whe fight to insist on payment for the residue as they would have had if no part had been delivered. "The blyer afterwards became bankrupt, and his acceptance will dishonored while the twelve pockets remained in the seller's hands. I am of opinion, that no payment billing been made by the bankrupt, and nothing equiwhen to it having since taken place, the assignee comot demand the remaining hops without actual payer went for them. It has been argued, that as the bill diviniby the defendants on and accepted by the builting is still outstanding, the sellers could notritin these Hops (b). It is true that owing to that circhildren they may not have that complete control of them which it would be necessary to have in order to confer a complete title on another; but still their right to retain possession till the payment stipulated for will not be affected. Stress has been laid on the

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and Others.

⁽a) See pp. 301, 302.

⁽b) See Bunney v. Poynts, 4 B. & Adol. 568.

Miles
v.
Conton
hid Offices

fact, that by the original contract, while the hops r 'mained on the ventor's premises warehouse rent was be tharged for their. Had it been all actually taid, would have made no difference thi my judgment as fight of property in the buyer, and that of posteri in the sellers(a) In Harry v. Mangles (b) onot on was the warehouse rent puid to the defendants; but t claimants of the oil had paid the insolvent its pri But if the sellers kad originally a right to hold the he till payment of their price and of the worthouse re also, the payment of that rent only will not entitle the "who represent the bayer to have the possession of t thops without payment of the price. Here, the contra is only a stipulation that warehouse rent is to be pa That does not make the seller's warehouse that of t buyer, but is only an intimation that in addition to the price of the article another price is also to be paid f the room it may continue to occupy in the seller warehouse. Thus in the interim the goods were remain in the custody of the original owner, whose rig to keep them till the contract was fulfilled by payme of the price, was entire while all the goods remaine and became divisible when part was taken away. The "the plaintiff being identified in interest with the bei rupt whom he represents cannot recover the false the hops without previous payment for them pains rol males completions there is a second to be eggiven esser-

right of possession must concur with this action in the bankrupt. The right of property appaired be in him; and he had a right to demand possession during the running of the bill; but when the part arrived at which it was dishonored, the sellers might avail themselves of the possession of part to insist a

⁽a) And see Bloxam v. Sanders, 4 B. & Or. 947. Per Para S. B. & Cr. 376.

⁽b) 1 Camp. 452.

retaining them in default of payment. In Winks v. Hanall (a), Littledale J. expressed a distinct opinion that the charge; for warehouse rent does not constitute such a delivery to the party charged as would give him a right to mainthin, troyer for the goods, ... The actual tender of the rent here made would be equivalent to payment, that that is not material; for as the twelve peckets of thops were never out of the vendors' possession, Lam; of opinion, that they might hold them equinate the menden till the purchase money is paid, ...

1834. MILES 91. GORTON and Others.

Cledita ston liin yluo merenat do as arrangara , see Gurney B. There is nothing in the case to show that after the dishonor of the bill the vendors should not hold the residue of the hope as against the huyer or his assigneed to carry a ration of the plane for a loth to di-

terrandition in rain a Judgment, for the defendants c

the state and comment process also to be put it (a) 9'B. & Cr. 375. 4 Same une og 1945 ammer at self at med at 1945 ammer at self at 1945 ammer at 194

Solly and Others, Executors of CHANDLER, against Hinds and Another, Executors of Underdown. The transfer of visit is a condition of the contract of the

ASSUMPSIT, on a promissory note for 100%, signed A subscribing his by Underdown, and payable on demand to Chandler, for value received. At the trial at the Guildhall sittings note expressed in this term, before Bolland B., a subscribing witness to on demand for the note was; celled for the defendant, who swore that value received, Malendawn being dangerously ill at Ramsgate, in August just before it village made his will, and said he had left Chandler was signed, the for the twouble he would have as one of his quested by the executors after his death. Three days after, Chandler him in lieu of a liteme to Underdown, who was still very ill, and said, legacy left him

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witness to a promissory to be payable in ker was reby the maker, who was then

March March Comme bridge to the control very ill, for the trouble he would have in acting as his executor. The payee having died before the maker: Held, that the payee's executors could not recover on the note against those of the maker.

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Solly and Others v. Hinds and Another.

that as he, Chandler, was to have 1001 for what he was to do in executing his, Underdown's will, it would save the legacy duty (a), if Underdown would sign a note for the amount then. The note in question being produced by Chandler, Underdown signed it. The subscribing witness said, "Mind, the note is given you for the trouble you'll have after Underdown's death." Chandler was silent. Six weeks after. Underdown, having recovered, sent the witness to Chandler for the note; but he would not give it up, unless the 100% was paid him. He died in December of the same year, before Underdown. At the trial it was urged for the defence, that the consideration on which the note was given, had failed. The learned baron directed a verdict for the defendant, giving the plaintiff leave to move to enter a verdict for the amount of the note and interest.

Follett moved accordingly. The evidence of the subscribing witness was admissible to show the agreement to be, that in consideration that Chandler would undertake to execute Underdown's will, Underdown would give him the note in question payable on demand; but could not be admitted to show, in contradiction to the terms of the note, that its payment was to be postponed till the payee had performed service as executor, or that it was to be returned by him if the maker recovered. Had Chandler sued Underdown on the note, the day after it was signed, must he have shown consideration in order to recover? [Bayley B. Hactenus, there was no consideration. The consideration was the doing the duty of an executor at a future period. It was prospective, and till Chandler was in a condition to fulfil it, he was not in a condition to sue.] The note is payable on demand; then had Chandler

⁽a) As to this see 5 B. & C. 501; 3 Pri. 368; 3 B. & Ald. 236.

med on it in his lifetime, would it have been a defense, at law, that the note was not to be paid till after, Underdoon's death, or till after services were performed. by Chandler as his executor? In Rawson v. Walker (a), it was held, that the defendants, who had given a note, and another payable on demand as a collateral security for goods. sold by the payees, could not prove by parol that they were liable on a contingency only, because it would be inconsistent with the terms of the note. [Bayley B.—The: evidence here showed, that there was no consideration(b), The time at which payment was to be made, is varied.]. In Woodbridge v. Spooner (c), parol evidence was hald. indmissible to show, that at the time of making a! promisery note purporting to be payable on demand, it was agreed that it should not be payable till after. the maker's death. Then who could be sued by Chandler on the note? He also cited Grant v. Welch wan (d).

1834.

BAYLEY B. - Had Chandler acted as executor of Underdown, he might have retained in respect of this mte. The evidence proves that the consideration failed. The authorities cited apply where a specific period for Payment is fixed. Here it is not on the consideration that the time of payment is postponed, but on facts colleteral to it. If the consideration could have been afterwards supplied, the note might have been sued on,... but not, in my opinion, during Underdown's life. In Grant v. Welchman time was given to pay part of a sum due at the time, and of which the party was then only able to pay a proportion. A note was given pay-

⁽a) 1 Stark. C. N. P. 361. Ellenborough, C. J.

⁽b) The presumption arising from the expression in a note, that it is from the balate reducted, may be reducted; per Abbot C. J. in Holliday Wi Affinian, & B. Ve. Cir. 505. Commence of the

⁽e) 3 B. & Ald. 233; 1 Chitt. R. 661. S.C. (d) 16 East, 207.

Solly and Others v.
Hinds and Another.

able at a distant day, but there was nothing to the payment taking place in the interim.

we execute the water is may be in a distributed.

Description of the second of the sec

MANSEL had obtained a rule for setting alias capias, which had been issued on January, the first writ having expired on the

Channell showed cause. Section 10 of formity of process act 2 W. 4. c. 39. shows legislature fixed the time in which a writ continued by an alias or pluries, only in the cheing sought to prevent the operation of the limitations. In other cases the act prescribe for issuing the alias or pluries, but directs by every writ issued under its authority shall bear day it issues.

Mansel contrà. The second writ was not continued. Before the act cited the alias a been tested on the return day of the first writ now, the first writ does not endure above four some entry of its return should be made on that time.

BAYLEY B.—The question is, Whather commight not be entered at any time in this cast the practice, to avoid the statute of limitation am of opinion, that they may, so as to connect

An alias or pluries need not, since 2 W 4. c. 39, be tested of the return day of the first writ, and their issuing is not confined by sec. 10. to any given period after the expiration of the first writ, except it issued to prevent the operation of

the statute of

limitations.

or pluries with the first issued writ. It was clearly not intended by the act, that the alias should be tested of the day the first writ expired. The plaintiff has the whole of that day to execute the writ; it may be in a distant county, so as to need an interval to get it up to town in order to rule the sheriff to return it. Then if there may be an interval between one writ and another, is there any thing in section 10 imperative on the plaintiff to issue it within a limited interval? I am of opinion that the provisions of that section respecting continuation of writs, by which a writ must be continued within a fixed period, only apply to cases where the writ issued to avoid the statute of limitations, and that in other cases it is not necessary to issue an alias or pluries within any given period.

1834. Nicholson D. LEMON.

VAUGHAN B.-The general words of section 10 enable the alias to issue as has been done in this case, and are not restrained by the proviso.

to define the formula Rule discharged with costs.

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IGGULDEN against TERSON.

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Kule had been obtained, calling on the plaintiff to An executor

show cause why a rule of court should not be who pleads and plene adpay his own costs. The defendant, who was sued as ministravit, is entitled to the executor, had pleaded the general issue and plene ad-general costs ministravit; both which issues were found against him. or the cause, if he succeeds After motion to set aside this verdict, it was agreed on the latter that plantiff should take judgment for 921. assets See thatide acciderint, and that the verdict on the second affidavit is nethe care to see, a construction in the 18:18 - 18:13 - 31;

non-assumpsit Semble. No cessary to substantiate be-

tween council what terms were offered or accepted by them on the hearing of a cause.

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issue should be set aside the master after such ings, draw up the rule accordingly. Thesiver ag the rule maintained that the master's decision's not be impeached. Halcomb contra - At the time showing cause against the rule for a new trish counsel for the plaintiff offered that each party sh pay his own costs. Bayley B. There is no affide It is unnecessary; the matter in question having pa between counsel, on the hearing of a motionism On judgment quando acciderint, the defendant was liable to pay costs. 5 1 1 to

BAYLET B. ... It is confessed that the verdict in have been for the defendant, on the pleas of a administravit; then had the result of the trial beet correct one, the defendant would have had the ger costs of the cause. Per Curiam.—Rule about unless plaintiff consents in a week.—No costs to la party.

Jones against Roberts, Executrix.

Issues were joined in fact and in law, and notice of trial of the former given, but the plaintiff having gone to trial, paid the costs of the day on subsequent

A SSUMPSIT for an attorney's bill. assumpsit, plene administravit præter cer judgments, and plene administravit generally. Re cation, that one of the judgments was satisfied, kept on foot by fraud. Issues in fact as to r Rejoinder, that the judgment was not satisfied. 54 murrer thereto. The plaintiff made up the issue motion in the fact, and gave notice of trial for the summer assized

term. In that term the demurrer was argued, and the defendant had lea amend, on payment of costs. The master disallowed all the plaintiff's coits'd paper books and briefs which related to the issues in fact, and was held in an action on an attorney's bill, the bill had been delivered, but an order for be particulars by adding the dates was granted, on defendants paying for the similal plaintiff charged for drawing as well as copying the amended particulars of the The master allowed the copying only, and was held right.

Designative, which he afterwards countermanded, but not in time, and the defendant obtained a rule for case of the day. Upon the argument of the demurrer [aste, p. 46;] the defendant had leave to amend the rejainder, by traversing the keeping on foot by fraud, upon payment of costs. Thereupon all the issues became issues of fact. The master, in taxing the costs on the amendment, refused to allow to the plaintiff his costs of making up the issues in fact, and of the briefs prepared for trial, and his other costs incident to the notice of trial.

Jones v.
Roberts.

Lloyd moved for a review of the taxation, contending that the issues must be made up anew, and the briefs skeed.

BAYLEY B.—The master has thought, that the proper costs to be allowed to the plaintiff were those to which he was put by preparing to argue the demurrer. The issues in fact ought not to have been introduced into the demurrer books (a). The master's disallownee of the costs of making up the issues in fact, stands either on that ground, or on this, that if the plaintiff had a right to make up those issues, the costs will be costs in the cause; for those issues will still be necessary, with a little alteration and addition occasioned by the mendment, the costs of which will also be costs in the cause. The plaintiff has been put in the same situation wif the pleadings had been right at first.

Another objection was then made to the taxation. The plaintiff's bill having been delivered, an order was made by a baron for better particulars, with dates of the items, the defendant paying for same. A particular stating the plaintiff's bill was made out accordingly, with a fair copy for plaintiff's agents to keep, and both were left

⁽a) Reg. Gen. M. 9 G. 4; 2 Y. & J. 530; and see Tidd, 9th ed. 739.

1834. JONES. 70. ROBERTS. with them. The master only allowed the charge for the copy, on the ground that as plaintiff, on enterin his cause with the marshal for trial, would have t annex the particular to the record, in obtdience? Reg. Gen. Trin. 1 W. 4. No. 6. [ante, Vol. L.pi 502 the charge in respect of drawing the particular would be costs in the cause.

BAYLEY B.—The plaintiff's bill of costs had been made out and delivered before the order formbette particulars, by adding the dates. The master therefore did right in disallowing the charge for drawing the particulars, and in only allowing for copying them. (10)

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Monck against Bonham.

SSUMPSIT. Indorsce against acceptor, of a hill of exchange. The plaintiff having given potice of trial without proceeding to trial accordingly, a rule nisi was obtained for judgment as in case of a none Cause was shown on an affidavit, that the bill had him paid, the action abandoned, and that the defendant knew of the payment in November last. In support the rule it was answered, that as the defendant dispute liability as ac- his liability as acceptor, and had not paid the hill the plaintiff, the latter was entitled to a perempting undertaking in order to recover his costs. · yg0

BAYLEY B.—A sufficient reason is shown for forcing the plaintiff to trial, particularly as the deligh ant may try the case by proviso, in order to obtain h costs.

Rule discharged!

. . .

Welsby for, Ryland against the rule.

Where a plaintiff who had sued a defendant as acceptor of a bill got payment from another party, and abandoned the action: Held that the defendant, who disputed his ceptor, was bound to take down the cause by proviso, and could not have judgment as in case of nonsuit, or a peremptory undertaking to try.

then them. The moster out; allowed the things TURNER HIll Another doorest Denman.

even the marshal for trial, would have

SSUMPSITE The declaration stated the defendant Where the to have been summoned to answer the plaintiffs in a first count of a declaravel trespose on the case on promises. The first non was against the same on a bill of exchange by the plaintiffs as in-defendant as sees, against the defendant as acceptor, alleging a acceptor of a bill of exmielby defendant to pay the amount according to change, stattembriand effect of the bill, and of his neceptance ing a promise to pay solate The declaration then proceeded what and the bill withreas also the idefendant was indebted to plaintiffs breach, and Olifer money lent, 60% for money paid, 60% for was followed by had and received, and 60% on an account stated," for money ended thus: 16 and whereas the defendant after- lent, money ds, on &c., at &c., in consideration of the premises a promise to ectively, then and there promised to pay the said pay limited : last-mentioned sums of money respectively to the sums, the mission request; yet he has disregarded his pro- if it goes on to and hath not paid the said montes, or any part state that he to, to the plaintiffs damage," &c. ma viga brown bud of grace engine com har

lemuirer to the declaration, stating for causes, that the said ough plainting have in their declaration alleged mories to the descridant promised to pay the four last-mentioned of Money in said declaration to plaintiffs, and has traided his promises, and has not paid any of the monies thereby, meaning the last antecedent that is to say, the four last-mentioned sums of ey therein mentioned, yet they have omitted to re any breach of the said supposed promise of the ndant in the said first count of the said declaration tioned: Also that the declaration does not allege any ch by the defendant of his promise in the said first * mentioned: Also that there is no such form of on as an action of "trespass on the case upon DL. IV.

paid, &c. with to the latter has disregarded his promises, and hath not paid said plaintiffs.

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. . . .

promises," but that the declaration should hat " an action on promises."

J. Jervis supported the demurrer. The breach in the first count, and that at the ensecond is limited to the four sums there menti-

Per Curian-BAYLEY, VAUGHAN and GUR

Judgment for the pl

Dundas was to have argued for the plaintiff.

HARDING against HIBEL.

Where a declaration alleged the defendant to be indebted to the plaintiff in a certain sum for work and labour, without laying any promise to pay it, and then under a 'whereas also,' proceeded to state him to be indebted to plaintiff in several other sums for goods sold and delivered, &c. concluding that the defendant had promised to

SSUMPSIT. The declaration of *Michael* stated in the first count, that the defend indebted to the plaintiff in 501. for work and as an attorney, without adding that being so the defendant promised to pay. The declarat proceeded: And whereas also the defendant debted to the plaintiff in 50l. for goods sold livered, 501. for work done and materials fou for money lent, 50l. for money paid, 50l. fo had and received, and 50% on an account at without any promise to pay in any of them: alleged as a breach: and whereas the defends wards on the same day and year aforesaid, deration of the premises respectively, then a promised to pay "the said last-mentioned sever respectively" to the plaintiff on request, yet disregarded his promises, and hath not paid a

pay the said last-mentioned several monies respectively to the plaintiff on request:—E demurrer for want of promise in the first count, which was not referred words "last-mentioned" in the second count.

es, or any part thereof, to the plaintiff's damage

rer to the first count, alleging for causes that st aver any promise by the defendant, or the place thereof. Joinder.

nert called on d to support the declaration. The whole is

ount.

YNDHURST C. B.—There are two counts, and leges no promise to pay the sums therein be due. The words "last-mentioned" can y to the monies mentioned in the second count.

riam—Leave to amend on payment of costs.

was to have supported the demurrer.

SIMPSON against PENTON.

IPSIT for money lent and paid, and on an The plaintiff unt stated. Plea: non assumpsit. ne Middlesex sittings in this term, one Over to the shop of pholsterer, swore that the plaintiff introduced the plaintiff

At the and defendant went together but not the

The plaintiff having introduced defendant, said in his presence to A. any objection to supply this gentleman with some furniture? If you will, swerable for it." A asked how long credit would be wanted? Plain"I will see it paid at the end of six months;" adding, it would be about A. sent goods to the defendant's house, and no payment having been a defendant within six months, applied to the plaintiff for the amount, aviously requesting defendant to pay. The plaintiff having paid the leld, that a jury was well warranted in finding that the credit was not to defendant, or to him and the plaintiff jointly, but to the plaintiff that the credit was not to defendant, or to him and the plaintiff jointly, but to the

promise to pay was therefore original, and not collateral only, so as to writing within the statute of frauds 29 Car. 2. c. 3.; and therefore that might recover the amount against the defendant as for money paid at his while, the circumstances of each case must be considered in deciding wheact be original or collateral.

SIMPSON v.
Penton.

the defendant to him and asked him in the prese the defendant "Have you (Ovenston) any object supply this gentleman with some furniture?" will I will be answerable for it." Ovenston walk plaintiff how long credit he wanted; the plainti "I will see it paid at the end of six months; "ia that he thought the amount would be about 40k. Ovenston agreed to it, and the defendant gave if order mentioning the articles. Both plaintin fendant told him they were to be sent to the delical house, which they described. They were sent a ingly, and amounted to 461. 10s. The defeated paid nothing at the end of six months. " Occasion called on the plaintiff to pay, and having taken him a bill at six months for the amount, recent money when due. The defendant never paid any and was never called on by Ovenston to pay. had known the plaintiff before but not the design and took no guarantie from the plaintiff. The Ovenston's ledger was "Mr. Penton per MY! Shall At the trial it was contended for a nonstilt,"the goods being ordered for the defendant by the the promise of the plaintiff could only be collater. should therefore have been in writing within the of frauds; so that as no request to the defends pay as the original debtor had been proved, the tiff had paid the money to Ovenston in his own Bolland B. gave leave to move to enter a nonething jury found that the goods were sold to and credit of the plaintiff, to be paid for by him him instance; and gave him a verdict for the amount.

Bompas Serjt. moved according to the leave red Was there such a request of the defendant to p would make the plaintiff liable over? The plaintiff liable over? The base was not legally liable to pay for the goods. This

moderaking to pay for them being void by 29 C. 2. 5.3. [Bayley B. That depends on the fact whether Oversion made the plaintiff or defendant his original debtor; for if the credit was given originally to the plintiff, then the plaintiff's contract is not an undertaking to pay the debt of another within the statute of finds.] The plaintiff's words are equivalent to those in Matson v. Wharam (a), which were held void as a provise for want of being reduced into writing. "If you do not know him you know me, and I will see you mid." [Bayley B. This defendant, if sued by Ovenstep, might have answered, "I never bought goods of you or engaged my credit." Then was the defendant mer trusted? Did the plaintiff undertake to "pay," mundertake to pay "if the defendant did not?" Those ma questions for the jury.] Dixon v. Broomfield (b) wher shows that the court is to decide whether the mertaking: is sufficient within the statute or not. Bayley B. That is questionable. Vaughan B. At all tents a jury must decide to whom credit is given on a me of goods. The purchase might be joint and the medit given to both; if so, the oral promise of the plainwas void, Anderson v. Hayman (c); and he paid Organia in his own wrong, not being liable to do so.

SIMPSON v.
Penton.

BAYLEY B.—The question is, whether the plaintiff or the defendant was to be paymaster? For if Ovenston we the credit to the defendant, the undertaking of the plaintiff was collateral, and ought to have been in writing whim the statute of frauds. But if the plaintiff originally indextook to pay for the goods supplied to the defendant, then the plaintiff was bound to pay Ovenston to them without a written contract, and had a right to

^{4 (4) 2} T. R. 60.

⁽b) 2 Chitt. R. 205.

⁽e) 1, H. Bia. 120; and see Croft v. Smallwood, 1 Esp. 121.

Simpson v. Panton.

sue the defendant for the price as for money paid his use and at his request. Whether the contract the plaintiff was original as above, and bound him pay at all events, or was collateral, viz. only bindi him if the defendant did not pay, depends on the Now "I will be answerable" and pressions used. will see you paid" are equivocal. Besides, we ought look to the circumstances to see what the contri between the parties was. I say so on the authority Oldham v. Allen, Michaelmas term, 24 Geo. 8. (where the court of King's Bench said, a contract mid be collateral or not, according to circumstances. T defendant had sent to a farrier to attend some home and said to him, "I will see you paid." The fami debited such of the owners of the horses as he knew and the defendant for the rest whose owners he did at know, and the court held that the defendant's promis was collateral as to the former and original as to th latter. That case turned on the same words, and circumstances were held to make the promise either original or collateral. Here, though the goods was furnished for the defendant's benefit, not a word of h pledging his credit is shown. It appears to me the the jury were well warranted in finding the plaintiff 1 be the original debtor. I rely on the facts of the ca and not the equivocal expressions of the plaintiff. am satisfied that though the defendant might be paid Overston, he had only a legal claim against the plaintiff.

VAUGHAN B.—The evidence abundantly shows the this was not a guarantie, but that the goods we originally furnished on the plaintiff's credit. It is said that the plaintiff has paid the money which he seeks

⁽a) This case is not found in the 3d vol. of *Douglas*'s Reports, contain *Michaelmas*, 24 G. S.

recover without authority from the defendant; but as he stood by while the plaintiff pledged his own credit for goods to be sent to the defendant's house, his promise to repay the price paid on his account is implied.

SIMPSON PENTON.

Bolland B.—Penton goes with Simpson to Ovenston's shop and hears Simpson pledge his credit to pay for goods selected for his, Penton's, benefit. Then the swidence warrants the original liability of Simpson to Ovenston, and Penton's liability to Simpson for the money paid by him on his account to Ovenston.

GURNEY B. concurred.

Rule refused.

PERROTT against DEANE.

THE defendant having been brought up under the A debtor who had been brought up t.28. s. 16. had sixty days allowed him to deliver in under the compulsory clauses s. 16 petitioned the insolvent court under 7 Geo. 4. c. 57. and 17. of the lords' act 32 Geo. 2. c. 28...

Brle for the defendant had obtained a rule to enlarge deliver his schedule, the time for filing the schedule, and having after

The Court, after hearing Follett for the plaintiff, said, insolvent court that as the defendant was to be brought before the insolvent court on the 15th January, they would enlarge this time for filing his schedule in this court till the time for delivering his schedule to

(a) See Rez v. Belt, 7 D. & R. 234.

had been compulsory lords' act 32 Geo. 2. c. 28., had 60 days allowed to schedule, but having afterwards petitioned the c. 57., this delivering his schedule to five days after he was to be brought up before the insolvent court.

1884.

A hill was .. drawn on the consignees of a cargo of coals shipped to Rochester by the broker at Newcastle, who had effected the purchase there. That bill was returned to the payees, the coal owners, unaccepted, on account of the date being too short. The broker having directed the payces to prepare another till at a longer date, they did so, and sent it to his countinghouse in N. for his signature. The broker had in the meantime left Newcastle in pecuniary embarrassment, and his brother, the come to the counting-house to investigate his affairs. The defendant, in the absence of his brother, and at the request and for the convenience of the plaintiffs, signed the bill

Sowerby and Others against John Butches ريء ازرد

A SSUMPSIT on a bill of exchange for 96U\$ in dated 8th March 1882, drawn by defendant and accepted by Devey, payable to the order plaintiffs. Plea : general issue. At the trial Deaman C. J. at the last Northumberland assi appeared that the bill had been drawn by the d and a London coal factor, in favour of the pla who we're coal owners. ... The plaintiffs' clerk was: for the defendant to prove that no consideration passed to him for the bill, and that the plaintiffs that fact. About the end of February 1832, the tiffs being applied to by Robert Butcher, the defen brother, a coal factor at Newcastle, to consign a of coals to Messrs. Devey of Rochester, shipper consigned it accordingly. After the vessel had a Robert Butcher drew a bill on Deveys for the a in favour of the plaintiffs; that bill was returned plaintiffs unaccepted, on account of its having drawn at too short a date. By direction of d Butchen, the plaintiffs' clerk prepared another bit sued on) at a different date, drawn on W. Devey and took it to Robert Butcher's counting-house in castle for his signature. He there saw the defer who said his brother Robert had left Newcastles defendant, had witness asked him if Deveys would accept a billi by him. The answer, if any, did not appear. H requested the defendant to sign the bill as dere his brother's absence, as it would be a convenie the plaintiffs, and he did so without objection. this the defendant attended to his brother's busin his counting-house in Newcastle, but witness. nothing of the previous transaction before he u the bill at the request of the witness; and that they had prepared without qualification of his liability: Held that he was per liable as drawer to pay the bill.

le in pecuniary difficulties. The lord chief efused to nonsuit the plaintiffs, but gave leave to enter a nonsuit. Verdict for the plaintiffs mount of the bill. A rule having been obtained why.

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block and Ingham for the plaintiffs showed The defendant, well knowing the cause of his s absence, transacted business at his countingand signed this bill without excluding his own liability, by stating on the face of it that he as his agent, or by procuration for him. f the return of the first bill. In Lefevre v.), a broker who had sold goods drew a bill on er for the amount in favour of his principal, who in London when the goods arrived. The bill drawn without consideration, and to expedite naction of sale; yet the broker was held liable :his own principal, on the ground that all the pal consequences resulted from his act of signing ids they would from signature by any other In Leadbitter v. Farrow (b), the plaintiff knowing mdant to be the Hexham agent of the Durham 150% to his house to procure a bill on London smount. The agent drew a bill accordingly in of the plaintiff on the firm in I miden which con-



Sowenby and Others v.
Butcher.

sonally liable; Lord Ellenborough saying, "unless h says plainly I am the mere scribe, he becomes liable."

Cresswell and Alexander in support of the rule. The evidence is, that the defendant came to Newcastle, m professing to transact his brother Robert Butcher business as his agent, but to investigate his affair The coals had been shipped long before he arrived nor was the first bill destroyed by the plaintiffs ti some time after the second was given; so that the appears no benefit to the defendant, or loss of any right by the plaintiff at the time of the defendant's signing's Then it was a question for the jury, whether it was in a mere accommodation bill drawn by the defendant i the absence of his brother, at the plaintiffs' request, in their convenience, and with their express knowledge that it was so drawn without consideration. C. J. Ew lays it down in Collins v. Martin (a), that the truth t the transactions between the original parties to bil may be given in evidence to destroy the prima faci presumption of value received afforded by them. In L fevre v. Lloyd the court seems to have rested the judgment against the defendant, on the ground that a being a broker in good credit, the vendors, in takin the bill he drew, relied on his responsibility, withou caring about the solvency of the purchaser. bitter v. Farrow, not only was the defendant an actual and well-known agent, but a consideration passed t him; and Lord Ellenborough C. J. says, "though th plaintiff knew the defendant to be agent to a country bank, he might not know that he meant to offer hi own responsibility." Here, even assuming defender to be an agent, no value passed to him, not even th old bill. In Thomas v. Bishop (b), it is said by the coun

⁽a) 1 Bos. & Pul. 651. See Guichard v. Roberts, Bla. R. 445.

⁽b) 2 Stra. 955.

Sowerby and Others v.
Butcher.

that in the case of a bill addressed to the master, and underwritten by the servant, undoubtedly the servant would not be liable, but his acceptance would be considered as the act of his master. It did not appear that the first bill was destroyed in consequence of any communication with the defendant.

BAYLEY B.—I am of opinion that there was in this case no question for the jury whether value had passed from the plaintiffs to the defendant for the bill, and that there was no evidence that it was drawn for the accommodation of the plaintiffs; but that the whole was simply for the consideration of the judge, who did right in directing a verdict for the plaintiffs. It may have been that the defendant unguardedly signed the bill without considering the consequences of so doing, and without consideration for binding himself a principal. But we cannot say there was no considention for so signing it. If drawn to accommodate any person, it was drawn, not for the accommodation of the plaintiff, but of Robert Butcher. The plaintiffs had supplied goods consigned to Devey & Co., for which Robert Butcher was liable, and for which he drew a bill on the consignees, which made him responsible as drawer, if they did not pay. That bill was returned unaccepted; the plaintiffs then had a right to sue Robert Butcher for procuring Devey's acceptance, or to have a new bill from him. They elected a new bill at a longer date, and prepared one for his signature. He left Newcastle; the plaintiffs might be wholly ignorant of the cause of his absence, or of any circumstances destructive of his credit. At that time the plaintiffs had a right to have a new bill drawn on Deveys, the consignees of their goods. On ap-Plication at Robert Butcher's counting-house they saw the defendant; and on his stating his brother Robert's absence, requested him to sign the bill as drawer.

Sowensy and Others o. Beroanal

was then it his discretion to sign the bill or not, and he signed it, he might state on the face of it that be did so as agent for Robert Butcher, or have signed "hy procuration Robert Butcher, John Butcher." Had be done so, Robert Butcher would have been liable. would have been the part of a prudent man to state that he only drow the bill as agent for his brother, and not as being personally responsible, and to have asked for a written acknowledgment that he should only be held liable as such agent and not personally. Here he signed it generally, and thereby incurred personal obligation and tis no lanswer to say that he had no goo sideration for binding himself personally, if he has professed to do so; for the plaintiffs were entitled, to insist on having some bill to be binding on some one The debt of a third person is a good consideration for which a man may hind himself by giving a hill of em change. In Popplewell v. Wilson (a), A. gave a note to may so much to B. for a debt due from a third person to By and it was held in the King's Bench, on crops from the Common Pleas, that it was valid within stat. Ann. c. 9, being an absolute promise, and every way as negotiable, as if it had been generally for value received Detriment to the plaintiffs, or a right in the latter to have a bill from somebody, will either of them afford sufficient answer to the objection of want of const deration for the bill. It is not sufficient for the defendant to show that independently of the bill there is no consideration; but he must prove affirmatively that there was none, and that the plaintiffs are wrong in demanding payment of such bill from any one. The consideration for a bill need not necessarily be such as would min. tain an action on a special contract. Here there was sufficient evidence of consideration, and that the was not drawn for the accommodation of the plaintiff

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Said Common of

⁽a) Stra. 264. Hil. 6 Geo. 1. See ante, Vol. I. Ridons v. Briston.

They would not have cared whether the bill had been drawn in the name of one or the other brother; but being drawn in this form, they have a right to sue on it progressive Roberts accordingly. in Rome of the water

1834. SOWERRY and Others v. Butchen.

VAUGHAN B.-I am of the same opinion. The case could not have been properly left to the jury as one ch the circumstances of which they could be warranted in finding that the bill could not be enforced by these phintiffs against this defendant. Whether the defendmi was clothed with agency for the brother, does not distinctly appear; but he is found at his counting-house sting in a manner as if he were conducting his business. Upon being requested to sign the bill in question, he od not by signing as agent interpose his declaration on the face of the bill that he would not be personally lable, but signed the bill generally. Then, as he did not qualify his liability in terms, he became personally responsible. The above is the main ground of my opinion. As to the argument that there was no conideration, the second bill was to be a substitute for the first, which was to be given up and was destroyed (a).

GURNEY B. concurred.

Rule discharged.

(a) Set Experts Berelay, 7 Ves. jun. 597; Puckford v. Marwell, 6 N. B. 68; Bishep v. Rowe, 3 M. & S. 363.

SIMPSON against RALPE.

ASSUMPSIT for attendances on the defendant, When a surand on another at his request, as a surgeon, and geon attended 4.

patients in cases requiring

micel aid, and also dispensed medicines to them, not being certificated as an Pothecary under 55 G. S. c. 194.: Held, that he might recover for his surgical

Semble, that a surgeon may dispense medicines to his patient in a case which he atterneds requiring surgical aid.

SIMPSON v. RALFE.

for work and labour, and materials furnished. particulars demanded 15l. for attendances, and go and materials furnished, sold, and delivered. general issue. At the trial before the secondary of I don, under a writ of trial, it was proved that the plain as a surgeon, attended the defendant for a comple in his eyes for several weeks in 1832, and was seen apply leeches, &c. He afterwards attended the fendant's wife for a palpitation of the heart and com During his attendance he sent in medicines to be A chemist proved that up to 1831 plaintiff used write prescriptions for patients, which the with made up, but that since that time he had not made any. A surgeon who was called to prove the charreasonable, was asked whether the cases descrit were surgical, medical, or mixed; and answered, ti they were surgical, and that for his surgical attendar in them the plaintiff was entitled to 111. The plain had a verdict for that sum.

Comyn moved to set aside the verdict and enter nonsuit. [Bayley B. You cannot move to enter a new suit without leave of the judge (a).] He then moved a new trial. The plaintiff is not entitled to record any part of his demand, as he is not shown to he been a practising apothecary before 1st August 18 nor to have obtained a certificate pursuant to stat. Geo. 3. c. 194. If a person acting as a surgeon of make up, compound, and dispense medicines, the objects of that act will be frustrated, and the examinations which it requires as to competent skill would obviated. The plaintiff's demand in respect of eacase is entire, and cannot be divided so as to entit him to recover for the surgical part only. In the Apothecaries Company v. Allen(b), the plaintiff kept

⁽a) See ante, p. 772.

⁽b) 4 B. & Adol. 625.

1834.

whop, but lived in lodgings, and was not able to make amp a physician's prescriptions, but advised patients and made up and sold to them the medicines he himself ordered. That was held to be an "acting as an apothecary," within the apothecaries' act 55 Geo. 3. c. 194., and it made no difference that he prescribed as well as prepared the medicines.

BAYLEY B .- That was an action for penalties for sting and practising as an apothecary only. icts of this case are, that the plaintiff is not an apothecary, and that part of his demand is for attendance surgeon, and part for medicines furnished. there was evidence for the jury that the complaints were of a nature requiring surgical aid. Then if the plaintiff attended as a surgeon, the apothecaries' act does not take away his power to recover for his attendance as such, because he also dispensed medicines. There is no evidence that the medicines were dis-Pensed by the plaintiff as an apothecary, nor does he claim as one. I do not see why he might not dispense medicine as incident to his business in the course of attending a patient as a surgeon (a). It was for the decondant to make out the plaintiff to have practised as apothecary, in order to destroy any claim he might have as a surgeon. A man, licensed by the College of Surgeons, may practise as a surgeon without a certificate from Apothecaries Hall, Apothecaries Company v. Ryan(b). The witness swore the cases to be surgical, and that the plaintiff's attendance, as a surgeon, entitled him to the sum for which the verdict was given.

VAUGHAN B.—Even if the plaintiff had acted as an apothecary, by dispensing medicines, how would that

⁽a) And see per Best C. J. and Park J. in Allison v. Haydon, 4 Bing. 621.

⁽b) Tried at the Kent assizes, but not reported.

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CASES IN HILARY TERM
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deprive him of the right to recover for his attaged the count of the dear of the description and provided the count of the description called aurity of the plant of

WINGROVE against Hodgson.

Where issue was joined in a town cause, early in the vacation after Trinity term, and no notice of trial was given: Held, that the practice was not affected by the Uniformity of Process Act. 2 Will. 4. c. 39. and that it was premature to move for judgment as

ARCHBOLD moved, in a town cause, for ment as in case of a nonsuit. Issue was job July, in the vacation after last Trinity term, and w livered on 24th October, without indorsement of no trial, [Bayley B. There has been a default in an only; for no notice of trial could have been given for the sittings in Michaelmas term.] Before the formity of process act, 2 Will. 4. c. 39. issue that would have been entitled as of Trinity term, instead as at present, the day on which it is joined. Trinit would then have been reckoned one term. [Bay dissented.] The case having been postponed in

in case of a nonsuit, in Hilary term, or before the third term.

to consider the effect of the uniformity of process act, the opinion of the Court was next day delivered by

WINGROVE

Hodgson.

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BAYLEY B.—Before the act alluded to, the plaintiff would have had the whole of the axt term after that is which issue was joined (a) in which to try his cause, and would be guilty of no default in so doing till the third term after that in which issue was joined (b). The officer certifies that in this Court two defaults to ty must precede this motion, where no notice of trial has been given. That being the state of the practice before 2 Will. 4, c. 39. the uniformity of process act, we bwe conferred with my brothers Parke and Patteson, who agree with us in opinion that that act makes no difference in the time of moving for judgment as in case & a nonsuit, and that that motion cannot be made till the third term after that in which issue was joined, unnotice of trial has been given; in which case the common rule applies, viz. that the motion may be mde in the next term after that in which issue was joined.

Per Curian. -- (Bayley, Vaughan, Bolland, and Gunay. Ba.)

Rule refused (c).

(c) Hell v. Buthanist, R. B. 2 T. R. 754, a country cause. In C. P.

(b) Nove, a plaintiff be too late in the second term to try, no default

| Parithed till actually committed; and a motion in the second term

in principal H. Bia. 558.
(c) the mine principle in a country cause, Simons v. Folkingham, ante,

Acres 640

arol evidence. Secondly, that we the pertuenship accounts had assured is a subspective and as expression of the second in the se

A SSUMPSIT for goods sold and delivered, w The pleintiff and defendant and defendant counts for money had and received and on coal-pit in account stated. Pleas general issue. coal-pit in partnership till proven at the last Lancashire assizes were, that in a transfer assizes were, that a distributed, when mine had been rented and carried on by the plant plaintiff said the would join and defendant jointly for some years before Decel in no more 1831, when the coal being worked out, which are coal-pits, and the coal-pits, and mutual request, balanced the profit and loss of the coal-pits. he should cern, with the exception of some coal still unsold, so work another a sold and the firm, and some small bills of det tiff joined him due from it not yet sent in. He was also to value t or not. The materials and materials and utensils in use for the mine, and each utensils be-longing to the party was to take an article alternately at that value tion till all were divided. The plaintiff said he was mine were valued, and join in no more coal pits; defendant said he shou each party was to take work another pit, whether joined by plaintiff or in an article by W. made an inventory, amounting in all to 1714, in turns, according to that vanexing a valuation of each article; and having met in luation, till the whole was parties, communicated to them the amount. At a divided. The sequent meeting the parties agreed that the defendant valuation should take the whole materials and utensils at half the was made, and it was amount of the valuation; he took exclusive subsequently sion of them in consequence, and this action agreed that the defendant, brought for the amount. should take the whole at For the defendant it was objected, first, that the valuation, valuation which was offered in evidence could a and he took possession of the received without a stamp, according to 55 Geo. 3. them. The other partner- 184. schedule, Part I. fit. Appraisement; and that a ship debts and credits rewriting existed, the amount could not be proved to mained unsettled: Held, that this was a transaction so separate and distinct from the and accounts, that the plaintiff might sue for his moiety of the value of the maters and utensils before the final settlement of the partnership accounts,

A valuation made for the information of parties, and not binding on them, is a made liable to an appraisement stamp, by 55 Geo. 3. c. 184. Sched. Part I. tite praisement, though an agreement is afterwards founded on its data.

parol evidence. Secondly, that as the partnership accounts had not been finally settled, and no express promise appeared to pay the moiety of the value of the parterials, the plaintiff could not recover. Bolland B. gave the defendant leave to enter a nonsuit on both points, but told the jury that if, on the facts proved, they thought the partnership at an end, and that the defendant took to the materials, &c. on an agreement to pay half the sum at which they were valued, they should find a verdict for the plaintiff. The verdict was for the plaintiff, for half the amount of the valuation. A rule having been granted according to the leave reserved, or for a new trial,

JACESON V.
STOPMEND.

R. Alexander showed cause. This action was mintainable upon the facts proved. Foster v. Allan-(a) shows that where, on a dissolution, partners account together and strike a balance, which is in favour of epa, including several items due on a separate account, and the other expressly promises to pay it, an action of assumpsit lies on that promise. Here was no promise, but in Smith v. Barrow(b), decided the same day as Foster v. Allanson, Mr. Justice Biller seems to have thought only the striking a balance necessary. He says, "One partner cannot recover a sum of money received by the other, unless, on Ablance struck, that sum be found due to him alone." And Gibbs C. J. afterwards held, in Rackstraw v. Imw(c), that no express promise was necessary, saying, The dissolution of the pre-existing partnership, and the mutual settlement of an account, are a sufficient consideration in law for an implied promise to pay a "thance on the side of the partner from whom such ba-

⁽a) 3 T. R. 479. In Moranda v. Levy, 2 T. R. 483, n. there was an express promise.

⁽b) 2 T. R. 476.

⁽c) Hok's N. P. C. 368.

1834. JACKSON STORHERS.

lanced is thue. The In Coffee you Brian (a) it was held it though no balance was struck imprey had and reasing might the maintained by one of three partners ragio another for money in his hands which held shoomed parited from the paritership account of Hore this gail property in the misterials, 860, became separated by the agniement, so an to west a moiety in the plaintiff sin [1] fact that aubalance was atruck distinguishes this sin from Bosiller. Hammond (b) where the plaintiff states habitia demand arose out of a pattnetable trabalistic non lited any account been stated between highland & partners. .. But this agreement nexpecting the material ed, no distinct from the other patting rahip contemb. on , be ImSecondly), the valuation was admissible santheast missie fenitary setter congributed done the stitute interpretate merely made for their information, so as ito mide the indement on their agreement (d) take the material of lbs lby lots i Atkinson our Fell (d). I fi Bayley But When the materials, Scowerb relied, the defendant washinded in obligation to take the whole. Besides, and Wa subs made the valuation, was called to prove the value of the golds, he might speak of them from this merciletionurefreshed, by the valuation he hadrimade without any necessity to produce it, quinappreisement in minime ecount till the accounts (b) Hablan vibroffbbbunnett un and the balance due from the partner to be sued m.F. Pollock in supportion their ylade Emithra Petru cited for the plaintiff is but authority that businesses cannot sue another till ambalance in struck whether themaland Fromant vii Coupland (a) shows others belonce must; be final of all the partnership recently There the plaintiff and defendant were coach numer horsing a coath from Bath to Leadon, the plaint

⁻ng os good ward o lage very case of t nove been (a) S Bing. 54. (b) 6B. & C. 149. (c) 5 M. & Sel. 24. (a) Ich & P. es, Burroagh J. S. C. net's, P. & Bling, 1, of being mally divided the different, street & Dr. ore and believe will

JACKSON v.

adiable domestiful art of the chall and the de-Soudant for the other the plaintiff receiving the fures, tend menderities the defendant weekly accounts of them. They work hold partners, and in an action by the pliniptiff, for the use of his stables by the defendant, the interious permitted to set off a balance struck in This I threat out the weekly recounters. Now here claims by addinguish the firm remained unsettled, at tribud boulds told laco qiderentuq alto de aniot ela llet pried of Hayley Bo Nortin Fromont vo Coupland did the weekly account affects all the partnership laffaired This werdick cannot stand; for my account was here settled, no division accomplished, interinal balance struck, or probile thipsychiade, as in Foster vil Allaheon; and theodefendant's aprovment hato take the materials in the ab the prize of the whole; and not at the indicty of that noice here smed for he The walnution bound the parties edite the mode in which the property was to be divided, and shald not, therefore, he admitted in evidence with-Besides, .qandia avtho obligation to take the wholemade the valuation, was called to prove the value of -Barren But Upon the general rese of law there its to difficulty with theing clear that lone! partner! cannot maintain an metion against another on the partnership account till the accounts of the firm have been wound up, and the balance due from the partner to be sued twithe partition making the dairs is accertained. But hyrapecial bangain between them, a particular transaction and be separated from the winding up of the indical tonesmi and when thus insulated is taken out of the general law of partnership outstituting between the puriness a separate and independent debt, on put-That appears to have been the case here, and to have been so presented to the jury at the trial. Had these parties actually divided the different articles into two lots, acJACKSON TO STOPHERD.

1834

VAUGILAN B. H. no motice of wollder of cording to the first agreement, and the defendant in afterwards, bought that belonging to the plaintiff t plaintiff would have been entitled, in justice, to be pa for that his moiety of the joint stock, I But on this e dence it may be that they agreed that defends should take the whole partnership property in the m terials and utensils valued, paying the value d from winding up the general partnership account That appears to have been the nature of the barge as left to and found by the jury, and I think it caus an implied obligation on the defendant to pay money for the plaintiff's moiety of the materials utensils before the final settlement of the general count. Nor is Fromont v. Coupland inconsistent wil that view of this case, or with the other decisions for the claim which the Court there refused to allo by way of set-off, was not on a bargain insulated in i nature, but on a balance of weekly accounts, of which there had been no suttlement; and on which, as it did no appear that the partnership was ended, the balance i favour of one partner at the end of one week might be against him at the end of the next, or at the find winding up of the partnership accounts. Here ite by the agreement of a purchaser only that the defen ant had acquired a right to take the separate posses sion of the partnership materials and utensils, in Bovill v. Hammond no account had been settled in add

Upon the question whether the valuation made in admissible in evidence under 9 & 10 Will 3 18 18 59., it seems to me that stat. 55 Geo. 3. c. 184. Scholling on the parties, but merely for their mutual intention, though its terms were afterwards adopted in the foundation of a new and distinct agreement of taleans.

and the state of header

IN THE FOURTH YEAR OF WILLIAM IV. KARU GIZAH A MEN

VAUGHAN B.—If any matter be withdrawn from the adjustment of partnership concerns, and made the suitjet of a distinct settlement, the general rule that one purper cannot sub another in respect of a partnership transaction, till the whole partnership concerns are add justed, does not apply. This agreement was, in effect, found by the jury to be a transaction separate from de final settlement between the partners for the coal wood, and the debts outstanding. The grabular mode the ball to parameters open over the standard that GURNEY B. The defendant being about to work a ew coal mine, without his late partner in that busic required the utensils respecting which the agree ant was made. The transaction was clearly separate the rest of the accounts unsettled between the har succession rather mereical to percenting more train Rule discharged." standardina god roga e en il llaste da con al dollar to primary and transfer to a state of the and common tion of mad have a construction of the material and the facilities in hallow appear charge en garages of an earlier, the balance

i id. 1834. YHIN Jankson. .. Pr ., i. STOPHERD. 11:11:11:11:11

TRESPASS against Hower the land agent of Parl T, the tenant of F, was of F, was plaintiff in an of acts committed in taking possession of a farm held action of trespass against for H. and I., who acted as attornies for F.'s land agent the defendants, were also attornes for the earl in a writ for taking possession of requiry, in which the latter was plaintiff and the preplaintiff desendant, and which was to have been under F. H. acted as F.'s but Island and the state of the Sales

shulpan Angel and the house the second of th

and it is attorney in sethat suits, pending between T. & F., and also for the land agent in the action of the suits, which was substantially defended by F.'s counsel, who held his general that suits being distinct in that action by the attorney M.: At the trial, H. having with the defendant's counsel, consented to an order of his prius imposing want terms on T. It was afterwards moved to set aside the order, which had ten made a rule of Court, on affidavits of H. and F. that R. never gave authority to consent to settle any action or matter in difference between them, but the Court refused to interfere in favour of F. in a summary way.



executed on the 5th Agnetilast at Transand colori other, apits, at lew and equity depending between th our and the plaintiff. A retainer offered beither plain tifficto, in a control western source it westerns to water residental H. and I. having informed the plaintiff that the control had a general retainention the early The cause hadin been entered for triel at the lest summer metizers in Gamman came on to be tried on Sd Additation gaungelaboth of whom beld general retainers from the earl, appeared for the defendants, and were consults by. He and the before consenting to take following saids of [Nasi Prints on " Thombay, Haves and Otherwised is ordered, by and with the consent of the parties is counsel and attornies; that the last of the informal papelled and sworn to determine this couse the with drawn. And it is further ardereduby such consent à aforespide that the farm now held by the plaintiff by the Right, Han. Lord Falmouth shall be wiven sub to the said Lord Elimmediately, and that all the plaintiff interest, and claim therein shall henceforth redeersha determine; And further that all proceedings shall ! staid in all strits and actions between the plaintiff muchti defendants, and the plaintiff and the said Lond F. by his afterney here in court woments to be a paiter such truler And it is also ardered, by such committee aforegaid, that mutual releases shall be executed by the said parties, the expenses of such relebses to de house by the party requiring the same. And it is also ordered by such consent as aforesaid, that thansaid Lordill shall pay the taxed costs of this dause and the sfurther sum of 1016 and moreover it is ordered, that this court of Exchequer may be imoved that this sides maple and the rule of court and come as "struccito ships, a shape On the 6th Aug. the town law agent of the feer latest thus to the town law agents for the maintiff and Mail Falmouth Thomas; Same v. Same Gentlemenal eing proposed, he consulted with the defendants

her some attempt has been made to settle these autions, the end and satisfied Hord F. will not enter into the compressions with Mr. Whomas, I how give you notice Authorial motivariotion any arrangement made with IL and I. having informed thanditistiff dasselse either guidal the soubidquent: 3d. Outober the following letter missritten by the same person to the plaintiff's agents: sulord : Rabbalth vio Thomas - Gentlemen. That there sity he i no mistake between us; we beg to inform you, biliven baver obefore done by that Dord F. I disaupped lawy sprement offich inay have been made without his att theity, and which the conduct of the defendant has is ordered, by and with the consent of the partifolding -monosth assist; Mewet, will behalf of the early deminded possession pursuant to the terms of the order d mich priudous Plaintiff then befüsed, unless her reend henipleunds and a release from the earl ("but on the 20th sent the only key there was; viz. that of the Why beithe defendant Heves as the entl's agent. The talenaf mini polosowas drawn up oh 6th Wovember, alid stall on the early town agents, as agents for the deindants and notice of taxation was given them accord-But hey on behalf of the earl, protested bethe master against such order, and against any testion under iti. The master then adjourned the tention till the order of mist print had been made a wood seburtane Ethat having been done, a new appointwas in taniwas given, on attending which a similar prothation was made a but the master proceeded to take belevits sand finished the taxation on 6th January. nOn 21st January Coleridge Serit moved to set aside whech of the order of nisi prins made in the cause, and the rule of court thereon, as related to Lord Falwork lifthe affidavit of Mr. H. the earls attorney, shall that the sattended for the defendants the trial of the warms of Thomas v. Hewes and others. That terms being proposed, he consulted with the defendants'

THOMAS

HEWES

and Others.

1884. Tasomat v: Hawaii and Oddera

counsel, who both held general retainers from their and that they, he, and the defendant Hones, laster to the arrangement proposed; that he had no author from the earleto enegatists for or factle this an brought by him against the plaintiff, or any others turin difference between them, or to undertake in consent to the payment of any monies by the saids to the plaintiff on racodumt of this or, any other as or that he should become a party it appointed of: print in this cause at the last Communications affidavit of the earlealso stated, that the did not sati time give any instructions whatever to his atten Mul-Hip or any other person, to negotiate for per A this action but the terms mentioned in the order of prius, or any termi whatsoevers .: and that he dide instruct: any counsel on his behalf, nor did he si or shithbrize his said attorney, or any other person mithe stry carrangement whatsoever (for a ; settlering this cause in any manner; and that he had not incl manner recognized or acquiesced in the orangem or terms contained in the order of nist privations pressly repudiated it on the first intimation therage.

layley B. Generally speaking, whent an agent tracts for his principal, who disavous having given I authority so to contract, and successfully region liability on that ground; the agent stands in the plot of the principal, and is personally liable (a). This a therefore, should be served on Mar. H. This may should have been made within the first founday last term, or at least as soon as the notice of tensions was served on Lord Falmouth's agent; therefore rule should be now granted on payment by Lord in

⁽a) See East India Company v. Handey, 1 Esp. N. P. C. 112; Fan Harrison, 3 T. R. 761; 3 P. Wms. 279; Kennedy v. Govera, 3 Esp. 503; Roscoe on Bills of Exchange, 383; Beauce's Lex M. 43. As a remedy against the agent in case for deceit, see Policit v. Walney \$4 Adol. 114.

minuté of such contains, the plaintiff has incurred since. the 6th November Ju bushafe said him and year and stone with armignature proposed; that he had no authority "Creeder showed cause ion affidavits distinctly stating that Huland A: were Lord; Felmouth's attornies in all the values mentioned in the order of his print in Then to cherese authority from the earl to Mr. H. was requintein visien to authorize the latter to consent to that other for though Mr. H. had no instructions from the this other into this particular arrangement, he had, whitetterney employed in the causes, a general latiduty to bind the earl in all of them. Whether H. all I were the early agents pro hac vice, is a question letween them and him. In Filmer v. Delber (a), and dithill of reference had been made with consent of detailed and attorney, and though the arbitrator had disting more than appoint a meeting, the defendant should be seide the order of nisi prius on an affidavit. stilling that she had expressly desired her attorney not water to any rule of reference, the court refused the metion; saying, the defendant's remedy was by action digularity her actorney. In Mole v. Smith (b), Lord Michaeld." It is for Mr. Skadwell to consider whethe he is authorized to give his consent for his client. Whe does. I must act on it, and she will be bound by it. If the consent of the counsel and attornies on both with it not sufficient in the absence of the parties themwhen great inconvenience will arise. The like if have tan be no reference of all matters in difference. Pringly the earl's name is not on the cause list, he was the substantial party in the cause, and his general Miner was used to secure the services of the defendanti counsel. Assuming that the earl could disavow giving the authority, no distinct act of his appears,

THOMAS

V.

HEWES!
and Others.

^{(4) \$} Tamt. 486.

⁽b) 1 Jac. & Walk. 675.

188Al Thomas n." Hewell and Othern:

which is a large in the control of t The first letter from his agent does hope appear with been in consequence of kny communications want ha Fernoula" have applied to the associate of June 1 assized to stay the order or mist drive and have indus early in last term (b) set aside the order, welthe wires made la dule of court a Bayley Bob In a Bisaligue of Flants (a), the action being the all alleged this like the case was defended by the defendance dansel whose actorney entered into a consent rule to abate un hussance without the defendant's consent and topsin his express direction. The court, upon very stron amdavita that the grievance combinine of was ntisance, set aside an attachment on the consent rac expressly guarding themselves against maring ad the cedent of their delision thuthatt case of thus am precede admitting the general rile to be that the attorned at cause being present is competent to consent to ment my vereited & arbitration to In Rex coloration and the motion of thicker all order by its praise praise court winter gifter our for the bistissually winter inth without the consent of the party of this consent but the court said, at an attorney exceed his sails rity; and his client be thereby prejudiced; of the acording is liable to make satisfaction to his chent but when matter of third to hake an order of his brake teries of the Coalt min h Furtibat v. Hogle (5) and the two made by Consent of Comselly the Solicitor on the da not being present, but his clerk offy! there Lord Cha cellor Lybuthurst said; "It was the Buty of the usumin if he dissented from the order, to have given aminedian notice of the objection," and suffering three the elapse without objection was there considered too loss der an award Walter of the construction of the brane na relation an interval.

⁽a) 1 Bing. 187. (b) Sayer's Reports; \$5542 87.18

where v. Braham v. (1973) and the second of the allifering to the process, in other, 2 h and a constant

THOMAT UNITED THE WEST

and Others.

... Coleridge Serit. in support, of the rule... The motion is in time, ... The letter of fith August, was sufficient to put the plaintiff on his guard. [Bayley B. The pro-Persenurse, to be pursued by Ligid Falmouth's agent would have been to have written forthwith to him to know whether he consented to or disayowed the reference... Having a doubt on the 6th August, whether he would ratify the arrangement, why not write to him and met a categorical answer on the subject? The agent, should have written to the plaintiff requesting him not to go out of the farm, or cease to cultivate it till Lord F,'a resolution was ascertained. It was unnecessary to wait till the order was made a rule of court in order, to move to rescind the order. Lord F. might well have considered that the plaintiff a refusal to give Hones possession of the farm on 5th August showed that he did not intend to proceed on the order as to the grounds, of refusal, ..., It was the plaintiff a duty to tender, the release for execution ... The first notice which Lord Frreceived, that the plaintiff meant to enforce, the order, was, on service of the first appointment, to tax. The order was not then a rule of court, and; the same tion, was successfully, resisted, nor was there anothen appointment to tax till after Minhaelmas term, Bayley B. If the plaintiff should apply for a distringue, against Lord Ralmouth for disobeying the rule (a), the court might refuse to proceed in that summary manners. on the ground, that; he never authorized his, attorney, to, bind him, but the party might bring his action.]. The gingian authority to an attorney to conduct a cause, desired authorize him to refer it. [Bayley B. It is constantly done (b)].

⁽b) No stutchment fies against a peer for not paying a sum of money water maward, Walker v. Earl Grossenor, 7 T. R. 171.

(b) See Bases v. Dubarry, 1 Salk. 70; 2 id. 787; Ld. Raym. 246; Holt, 78; Skian. 179; 12 Mod. 129; Carth. 462, S. C. and cited arguendo Barker v. Braham, 3 Wils. 374. And see 1 Salk. 89; Dyier, 217, 3.; Biddell v. Desse, in error, 6 B. & Cr. 255.



BANLEY B. There is no necessity in this case to be down, any general rule as to the power of popper latt attornies, to bind, their clients, by concenting to forms on their, behalf, for the application may be well decided thy reference to its own circumstances. Thank the compact for the defendants might not have had authority to bind Lord Falmouth, the fact that they were consulted at nist prime, shows that the reference which took place there was not made without consideration or able advice. The terms being agreed on, Lord Falmouth & he his attorney here in court," consented to be a partir to the rule.... The attorney is not stated to be Lord Felmouth's attorney in the suit, but generally as his settorney... Now this application is to set neide the dider of nisi prius, on the ground that Lord Falmouth had given no authority to his attorney to do the act he did, and is therefore not bound by it! If we were to make this rule absolute, we should decide conclusively trade question, whether an attorney has a general authority to hind his client in such a case; and if he has not who ther Mr. H. had, in the present instance, the authority of Lord F, to consent to this order. By so deinment should hinder, if not conclude the parties from obtaining the decision of the regularly constituted tribunel he which that question ought to be trickly of am nieti awar of any decision establishing our power to set esidenthe agreement of parties at nisi prius, and I am extistis that it is not conferred by the statute 9 and do Willia c, lo... It is said that we may interfere, as the cordered nisi prius has been made a rule of court abut itties different question whether the order should be enforced by attachment, or the party left to his action of The with of authority from Lord Falmouth to his attorney lin enter into this arrangement, seems to me to be a contetion to be raised hereafter, in case of a distringue being moved for against the former for not performing the

utilian Such wi motion might be resisted by showing tishough his attorney did consent to his being a ey, oit without the wathority of his employer. webult might then refuse the distrings and leave plaintar to his remedy by action. A fary would wdeside the question; whether Dord Falmouth had ennuationity to Mr. H. to do what he did in this a in his hame, and as Mr. H. doubtless thought, for Benefit. Air erroneous view of the law could in that bibe set right on a writ of error! whereas by intering in a sommary way we should prevent a jury in deciding on the facts, and a court of error on the real Phe lateness of the application is another reason minet the rule, but I do not rest my judgment on that of men per soon the gramma that hard Valuetel out proute ob or committee a set with all one words

WANGHAN B:-If I had been called on to decide sther Lord Falmouth was bound by what was done ishis attorney when at the assizes. I should have whited whether he was. This action being brought ninet the defendant for an act done as Lord F.'s ad agent in the course of his employment, it may be niidered as a cause in which Lord F. is substantially dusty: But assuming him to be so, the attorney could vatche utmost bind him further than in that cause. n agent can only bind a principal while he nots within shope of his authority; whereas here the attorney keston him to refer not only this cause, which turned sair injury to the plaintiff's possession, but also other its of more importance in which Lord F. was inrested. . But I rest my opinion against the rule on relationess of this application, which was not made Ithe 21st January, though as long before as the 6th squet Lord Falmoutk's agent was aware of the arndensent at the assises, and the order of nisi prins as drawning on the 6th November, and served on Lord



THOMAS

THOMAS

HEWESI
and Others.

Eglmosth's town agent with notice of taxaterized half meantime the state of things may have materially a terned, to the plaintiff's disadvantage of Then willist deciding on the question of authority this Hulbungareh discharged, which will have the parties at liberty will ren that Lord Lindment's woundoing near incites up adt easures should then have been taken to seem all near BOLLAND Ben Were we to lact in the summan the pointed out by this rule, we should preblide the partie from taying the question in the proper mode. 49% Each of fraud or gross misconduct of the attorney & Cour might set mide an iorder of court made on a greenes of the parties. In Furnival v. Bogle the passing of the order was afterwards suspended, and finally superseded on affidavits stating circumstances to show that the plaintiff's counsel, when they consented to the terms in the order, had not been informed that their client had positively rejected the same terms when previously offered.

RES Courses of LEGISTER

GURNEY B .- This application is made by a party who, by H. his attorney, consented to an order of nis prius, supported by an affidavit of that very attorney that he had so consented without authority. denied that in this action Lord Falmouth, if not the nominal, is the substantial defendant, and that Mr. H. though not a party on the record, is the substantial defendant, and that Mr. H. is his attorney in the writ of inquiry and those other suits with the plaintiff mentioned in the order in which Lord Falmouth's name is on the order. Nor can it be doubted by whom Mr. H. was employed to defend this action, as he claimed particular counsel who had a general retainer from Lord Falmouth. Then, after consenting by attorney to this order at nisi prius, he comes as late as the tenth day of this, the second term, to set aside the order, without sen affering to put the plaintiff in the same situation in which he tweet previous to the arrangement at the saires. It is impossible for us to do so now. 'In order' to prevent the order of inisi prius from being 'made' effectual. A specific inotice: should have been prombtly given that Lord Falmouth would not consent: Active measures should then have been taken to stop all procedings under it; instead of which/possession of the fun is demanded and given up is pursuance of it; nor! is any step taken to invalidate it till after the notice to Lord Eulmouth's agent of the second appointment to reache costs. To grant this application, therefore, would be most unfruit.

1834. 42 THÓMAS Hewes and Others.

Inhorage Maril tone or respect the continue of another all with male and Rule discharged with ogsie, and mount of the See Wright's South, plant of the many of transpolar bull trails at all their homeouth a sport that built better add durally ring an administration of the formation of James 10

Rex against Maberley.

MOS (for the Attorney-General) moved for a rule A fiat for an 20 1 1 H 110 8 1 absolute in the first instance, for a writ of imme-been granted diale extent, to be tested on the day on which a fiat for more than a method against the defendant was dated, viz, as far plication for an back as 22d February 1832. He cited a passage from extent, the court refused Manning's Exchequer Practice (a), stating it to have to grant a rule been held, that an extent may issue at any distance of might issue time after the inquisition and fiat, bearing teste on the tested of the day on which the fiat was granted. In Rex v. Bruce (b) the fiat bore a new extent issued three years after the original one, date. tested the day the latter had issued. The filing the and of danger, and all the proceedings at the office when the fiat was signed, enabled every intermediste purchaser to know the existence of the extent.

éxtent having

^{(1) 2}d witt. Revenue Branch, 26.

⁽b) Id. 27, n.

1834. The King v. MABERLEY.

BAYLEY B .- Regularly the extent should bear date the day it issues. More than a year has hare classed since the fiat bears date. The crown is in this are within the maxim, vigilantihus non domnioutibus subvenium leges (g). Assuming that the parties interested. who may be remote vendeed, should search the files they might well conclude that the teste of the first being the day on which an extent might be issued was the day on which that proceeding, if issued, at all rould have issued. In Res v. Bruce, and the cases sited in Manning's Practice, there had been previous dutents(6). In Rea v. Bruce, Wood B. thought, that if extents were suffered to be ante-dated, it might affect interesting transactions, and disturb property in the hands of remote vendees. In Giles v. Grover (c) several of the judges repeatedly laid it down that an extent ought not to be ante-dated. The remark distributed by

. Amos took nothing by his motion. The in the small produced the Continues of the best

(a) Hobart, 347.

its a from out not piet

(b) And see Rex v. Harvey, 7 Price, 238, contrary to those cases.

(c) 1 Cl. & F. 72; 9 Bingh. 128; M'Lell. & Y. 232.

STRICKLAND against MAXWELL Esq., Sheriff of YORKSHIRE, and Another.

A printed instrument purporting to be a torm of deTRESPASS for breaking and entering the plaintiff house, stables, outbuildings and closes, breaking

mise of a farm, had originally contained in the habendum words creating a m from year to year, but on producing the instrument in evidence they were found be struck through, and were proved to have been so struck through before exactly of the instrument by the party changed. The remaining words of denies were the term of one year fully to be complete and ended," and stood immediately ceding those which had been struck out. However, many subsequent stips remained in the leases, which seemed to be only applicable to a tenancy for longer than a year, or determinable by notice to quit:-Held, first, that the words street doors and gates, &u. seizing, mowing, and taking possession of his crops, trampling corn and grass, prostrating trees, hedges and fences, filling up ditches, and hindering the plaintiff from having the use and enjoyment of his farm. ! Second count, for an expulsion from certain closes named. Third count, for an expulsion from a dwelling house, stabling, and outbuildings. Fourth count, de bonis asportatis. Pleas: not guilty, and several special justifications by defendant Maxwell sheriff of Yorkshire, and the other defendant as his balliff, under an execution against John Thomas and Robert Smith. Issues thereon. The cause was tried before Denman C. J. at the Yorkshire summer assizes 1633 builthe plaintiff was landlord of a farm let to Themse Swith by the following instrument of demise, dated 4th November 1831, which was produced at the trial, signed by Thomas Smith. The plaintiff agreed to let to the said Thomas Smith the farm and premises (upon which the supposed trespasses were alleged to have been committed) from the 6th day of April then next, for the term of one year fully to be complete and

1834 Strickland w. MARWELL and Another.

through might be looked at to ascertain the real intention of the parties in so erasing them, and consequently that the tenancy was for one year only; and next, that the sipulations inapplicable to such a tenancy must be considered as struck out, or as

the right to the way-going crop, quere.

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supplement, unless the tenancy should continue for more than a year.

By this same instrument of demise, after a covenant for payment of rent by the tenant, it was agreed "that in case the tenant should duly observe and perform the sevenal covenants and agreements thereinbefore contained on his part and behalf," and should peaceably quit the farm in pursuance of notice to do so, he should be tamer, such crop being to be left for the landlord or his incoming tenant at a matter to be made by arbitrators or an umpire:—Held, that this clause did not give the tenant the right of possession of the land to the exclusion of the landlord, the determination of the year's tenancy, but at most only a right to go on the land to improve the crop; and that the landlord might maintain trespass quare descen fregit for taking possession of the crop and hindering him from having the mad occapation of the land after the year expired.

Whether the payment of the reat was a condition precedent to the tenant's having

STRICKLAND
MAXWELL
nud Another.

ended (a), under certain rents, payable, by two equals half-yearly portions, on the 11th day of October and the 6th day of April in each year. By the said agree ment the said Thomas Smith agreed with the plaintiff of the payon of the premises in the premises in the payon of the payon

The instrument also contained (amongst several other clauses usually inserted in leases) the following clauses to quitting the premises.

"And that the said Walter Strickland, his hear or assigns, or his or their incoming tenant, at any time after the 1st day of January preceding the 6th day of April, when the said Thomas Smith, his executers or administrators, shall have given or received notice to quit the said farm and premises, shall have full libert to enter upon and to plough and cultivate all the arable land except the fallows or turnip fallows of the preceding summer; and also shall have the use of the stable of the said farm and premises, and shall have liberty to sow with seeds and harrow in the same, or any part or

⁽a) Here had tellowed the words " and so on from year'to year until the party shall have given six months', notice determining this agreement, thinks had been struck out before Thomas Smith signed the instrument, which was a form printed with blanks, afterwards filled up for use.

of the fallow or turnip lands from which a way or oing crop is to be taken, as is after mentioned. also contained a clause that the tenant shall be ved the cost price of all seeds sown by him the preng year, if not eaten by sheep or cattle. A clause the way-going crop was as follows: And the said Walter Strickland doth hereby agree, in case the said Thomas Smith, his executors or inistrators, shall duly observe and perform the ral covenants and agreements hereinbefore coned, on his and their part and behalf, according to the intent and meaning thereof, and shall also duly and eably guit the said farm and premises in pursuance my such notice as is hereinbefore mentioned, he or stial be entitled to a way-going crop of corn not eding sixty acres, to be taken from such parts of land in tillage as shall have been in seeds, fallow arnips, (eaten off with sheep) the preceding summer. if there shall not at the time of quitting be so much which has been so fallowed or turnip fallowed, the deficiency shall be taken from such of the s then in seeds as shall fall in due course to be i ploughed out: and which way-going crop, it is by agreed between the parties hereto, shall be left the said Watter Strickland, his heirs or assigns, or incoming tenant, at a valuation to be made by arbior an umpire in the manner herein mentioned, subject to reduction therefrom of 1s. 8d. per acre the constand and taxes of the land on which it shall frown, and also allow for the expenses of reaping, shing, and delivering the said crop. i March 1839, two executions issued against Thomas ith and two others, under which the whole of Thomas ith's crops and effects were seized." The sheriff's cers gave notice of having taken possession to the untiff (the landlord) and his known agent, pursuant

STRICKLAND
v.

MAXWELL
and Another.

1834.
STRICKLAND

v.

MAXWELL

and Another.

to statute 56 Geo. 3. c. 50. s. 2. "The agent then give notice to the sheriff that rent was in arrear from Phonics The furniture, cattle, farming implements, and all the moveable effects of the defendantia were sold by auction on the 6th and 7th April 1838, and we the list day's sale the sheriff paid to the plaintiff's agent the rent which was then due. The produce of the wild was insufficient to satisfy the execution first issued in Much, as the sheriff had to satisfy a prior execution has 2001. On the 3d May last the manure and Sixtumes wile valued by two persons, one appointed by the plantif, the other by the sheriff, and by an umpire chosen by the arbitrators. The value awarded was afterwards wall to the sheriff. At that time, viz. (before this method was commenced) the sheriff offered to give up to this shift. tiff possession of the grass land, and of suich of the arable land as the tenant had no right to for his waygoing crop, and in respect of which he was not this tled to any remuneration for plenghing or bowing with corn; but the plaintiff's agent demanded personalistic the whole, as well as of the growing event beloughing to the tenant, denying the tenant's right to have tally waytheir intended for a congoing crop.

The plaintiff was excluded from possission of his part of the premises, and no rent since according the had been paid; Hoskins v. Knight (a). For the defendants it was contended, first, that a continuity for session by Thomas Smith was contemplated for length than a year, and could only be determined by a notice to quit: and also, that having a right to a way this crop, he was entitled to possession of the soil of which it grew, as there was no evidence that the covenints affecting the right to it had not been performed to The chief justice directed a verdict for the plaintiff, giving

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STRICELAND

MANWELL

and Another.

John Williams, Greenvell and R. C. Hildyard showed cause, in Those werds of the habendum which so they originally other in the printed form of the agreement fema lease gaze it the effect of a tenancy from year to yatta havitte been struck out the words of demind remain of for the term of one year fully to be domplate and ended if in which case no notice to quit is requisite. So for all in clears but the difficulty arises from the eventight, of reteiging a nitrobest of asignalations which are applicable to the lenger term of a termou from year to what, for which they were originally intended, has appropriately to the shorter term exerted by the ientemport. The intention of the parties to abridge the duration of the terms, as it stood imprint, is however clear; and the habeadons, as moulded by the crasure; equally so, Indeed the inct of exacute shows more strongly their intention to exclude a longer tenancy than for a years has it will be around that the particular coveannte which remains a.g. not to take more than two crops successively, and as to the first order of corn after turnise from show that this interment confers a tenancy some year to stan, not determinable till the end of three pages, at least in Thea construction would after the duration of the term contemplated by the parties, and plainly expressed by them in the habendum. Doe d. Speces, v. Godfoin (a) is in point. There a lessee covenanted not to assign the premises without leave of lessor, provided always that if any of the covenants

⁽a) 4 M. & S. 265. See Crisp v. Price, 5 Taunt. 548.

Statements

Statements

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Maxwere
and Another.

hereinefter contained on the part of the lessee that be broken; it shall the howful for the lessor to re-ceited. There was no coverlant on the lessee's part after the provison and it was held, that the lesion sould mutienter, for breach of the covenant not to assign store the owner. hereinafter could not be rejected anni as in could not be seen with certainty what was the intention of the parties, the tophy safe rule was to adhere to the words (a) . (Bay: lety B. In that case it might have been that there were originally subsequent covenants which were strucks and without also erasing "hereinoften contained!" Links Las: bendum being express should prevail overtain inconsists: encies, mhichean conbonrise by implication, after comma paring it with other ambiguous parts of the instrument -In the Touchstone, 580 its office is said to be 40 to set foith: what estate the grantee shalkhave und for what time he shall hold the thing given or granted "in Collet 6 . 3 "to name again the feoffee; and to limit the dertaintrest? the estatepolitizathat ignasted obyishes premited solither deed); (1) (The general implication of the estate which shall, pads by construction of law by the premises, is always controlled and qualified by the habendum (5) an atomar also alter and abridge the certainty of the estate Studen ley v. Butler (e): It Baldwin's case (d) Lord Colos anno "aNote, reader, andifference between an estate in this premises implied and an estate expressed; for it is grant a rent to B. generally, the same by implication. and donstruction of law is an estate for life 1 but if this. habendum be for years, it is good, and shall qualify the

right to the crop could exact the except which are

⁽a) See Mr. Lastice Bayley's jydgment of the Albert See also Buckler's case, 2 Rep. 55 b.; Vin, Ab. ait. Grant (19) Co. Lit. 188 a; Earl of Shrewsbury's case, 9 Rep. 47 b. 49 b.; and see Themas's note. 1 Rep. 478. new edit.

⁽c) Hobart's R. 170, 171. As to the habendum frustrating the estate, see id. and 1 East, 506.

1834. STRICKLAND

diality and implication of the premises." No imstion-shalk-be-ladmittell (to overthrow) an express the deed (a). of Againg the shabendum must mailion respect of its priority to the part supposed to and Another. circulistent with its: if there are stwouchuses or throfisideed repugnant the one to the other, the first find o hel reserved and the latter rejected i except stabe some special reason to the contrary. See the wateria 188; 0061 Bale Vie Thomas ve Howell (b). water Mann(a) is However the clauses which their exable to a the anon from year to 'year, are not neces-Agriconsistent, with the habendum : 9 They awould aperative, if the itenant remained in possession more make tyear sland the chief justice at the trial inclined ha opinion that the instrument operated as a demise -single and establishment of the stipulations must be On to have been retained in case the bolding conaddist following Bil Anty part not imapplicable to the ition between a dandlord and a temant from year to daminishave-operations of Next, did the tenant's ht to the possession femain, under the clause for the reguling evently (lift the tenant had a right to that p. The clause in squestion did not give him a right to pession even of the land on which it stood; but to remunerated for seed, labour, and expenses, on ment of the rent and performing the covenants. wir shot impressed to be in arrear, and Porter w. spherical shows the payment of it to have been lendition (pracedent, without performing which tho ht to the crop could exist. [Bayley B. Might not ith, as tenant from year to year, be entitled to culthe land for the way-going crop, for which he is be paid at a valuation?]

ra a log graterikan golonetika i) Bac. Abr. tit. Grants, (I.)

⁽b) 4 Modern, 69.

^{) 3} Atkyns, 525.

⁽d) 6 T. R. 665 (in error from C.P.)

1834.

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Jones Serit, and Alexander in support of the rule. This was a continuing tenancy not determined by proper notice to quit No ergument in addicable if founded on the words which are struck sitter The fastrument must be construed on its own expressions as it now stands, without reference to any fact, osidaclemtion extrinsic to it. For if the declarations of the perties at the time of executing a written instrument would not avail to vary its effect, neither can their act at that time be evidence for that purpose. . The intertion of the parties is to be gathered from the whole of an instrument, not from an isolated expression in it; and if any difficulty in so doing arises from the matrix of conflicting clauses, that construction must be adapted which will give effect to the greatest part. Thempifen regard had to the whole instrument it is found clean that the tenancy was from year to year, on for mose thanks year, if notice to quit was not given within thereinde, the expression in the behendum will not o restrain its operation to a year. It is argued that if there is not a demise for one year only, it must be a demise for these years at least; but no words in the habendure limit the tenancy to that duration. If the habendum livide zead as a demise for one year only, that was like the subject to the contingency whether notice to quit wit given in the first half-year; for it appears from the other parts of the instrument that such an interest was intended to be granted as should continue cilludetermined by a notice. Bayley B. This instrument secferred an absolute unqualified term and lease for the year. The tenant had the same rights as if it had a been a tenancy for ten years, of which this man the last; he might prepare the land for the next year. crop, so as to be taken at a valuation, if he had paid hi rent. I think we have a right to look at the instrument # as it originally stood, viz. for one year, and so on from

year to year. We find on the face of the instrument, that those words which would have given the tenthey a longer duration than a year are struck out. Covenants follow applicable to that longer tenancy which the ceased words would have created, and inapplicable to the state of things which that crusure had substituted in their place. Then ought we not to consider every thing imapplicable to the tenancy from year to wear as struck but, and so much only to remain in the histrument as is applicable to the tenancy created? May not the plaintiff tay, the lame was originally meant to eperate one way and was afterwards aftered to anothere] That would be to vary the effect of the instimment, because words were once contained in it which are not there new, and were not there at the time of its execution. But no fact so appearing can alter the effect of the instrument itself, it being awintish dehora it, as if contained in a separate patter. 1 [Bayless B. A court of error might give an opinion on the real construction of that document; for a fac simile digital be put on the record, or the fact might be found what words atood originally, what words were struck out, and what others were written in their stead. That would be to explain a written instrument by pardl. Suppose words to be written on an erasure, could whore effect be given to them, because they were preved not to be in the original, but appeared to have been since substituted by the parties on more mature advice? Suppose that the words are so completely erased that they cannot be decyphered, is the party to lose any advantage he might have had if they could! These are necessary consequences of the doctrine contended for by the plaintiff. The fair construction of the -whole is, that the parties contemplated a tenancy which might continue beyond a year; viz. that the tehant was to have the farm for one year certain, and then from

1834.
STRICKLAND

MANWELL

Mid-Another.

STRICKLAND
MAXWELL and Another.

year to year, unless notice to quit given. Besides, if the terms of a lease are doubtful, it is a rule that the construction is to be in favour of the lessee, who is considered as grantee; Dann v. Spurrier (a), Comyn's Landlord and Tenant (b), Lilley v. Whitney (c), Seaman's case (d). Every deed shall be most strongly construed against the grantor, and the grantee shall take by the premise, if they be more for his advantage; so if the construction be doubtful, the deed must be favourably expounded for him (e). In Wright v. Dickson (f) the material word coals had been omitted from the lease but being clearly an omission, was introduced into it by the court as was plainly intended by the parties, on the ground that where a material word appears to have been omitted in a lease by mistake, and other words cannot have their proper effect unless it be introduced such lease may be construed as if it were so inserted although the particular passage where it ought stand conveys a distinct meaning without it. ley B. Equivocal words there received a construction The words used were "great chows" and "panwood," meaning small refuse coals; and the House of Lords held, that they included great coals also. There are many cases to show that a particular word omitted by mistake, but found essential to the context, may be supplied, after first showing that it is required by the context.] Here one of the stipulations in question wholly inconsistent with a tenancy for one year only for instance, half a year's notice, though fit for & year's

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⁽a) 3 Bos. & Pul. 403, relied on by Lord Ellenborough in Dos v. Dish, 9 East, 15; and see Dann v. Spurrier, in Chancery, 7 Ves. 231. Hall v. Richardson, 3 T. R. 462; Ferguson v. Cornich, 2 Burr. 1034, are contribed also Price v. Dyer, 17 Ves. 363.

⁽b) 1st edit. 81, 106.

⁽c) Dyer, 272 a.

⁽d) Godbolt, 166.

⁽e) 2 Rep. 23.

⁽f) 1 Dow's Parl. Cas. 141; see Lord Eldon's judgment.

tenancy, is wholly inapplicable to a tenancy for a year

only. Secondly, it is contended, that the tenant was to have not the value of the crop only, but the crop. For by the agreement he had clearly such a right to the way-going crop as would include a right to enter and take it; and if he had any such right of possession the plaintiff had not that possession which would entitle him to bring trespass against the sheriff. Crosby v. Wadsworth (a) shows that Smith had such an interest in the land as would support trespass. [Baylev B. That case applied to grass, the natural produce of the land (b); but here on the 18th April, after this year expired, the defendants locked up not only all the gates of the fields containing the way-going crops (c), but of the homestead also. Smith was on the farm on the 6th April. Going to the land and demanding possession constructively vests the right of possession in the party entitled to it. The possession of the wrongdoer must be actual. Even admitting the outgoing tenant's right to get his crop, that was an easement in him for that purpose only; but the general right of the landlord may remain to bring trespass for other acts done to the close, e. g. for placing stones there, or for using t as a way to get stones from it.] To hold that the payment of the rent and the performance of the covenants formed a condition precedent to the right to the waygoing crop, would entail this consequence, that if a shilling of rent was in arrear for a single day, the tenant would lose the whole benefit of that crop. Holding v. Pigott (d) decides, that if the lease contain

STRICKLAND
MAXWELL
and Another.

⁽a) 6 East, 602, 609; see Co. Lit. 4 b.

⁽b) And see Tomkinson v. Russell, 3 Price, 287; Stammers v. Diron, 7 East, 200.

⁽c) A complete taking possession by the sheriff. See per Richards C. B. 9 Pri. 290.

⁽d) 7 Bing. 465.

STRICKLAND v.
MAXWELL
and Another.

no stipulations as to the mode of quitting, the off-going tenant, is entitled to his way-going crop, according to the custom of the country, though the terms of holding be inconsistent with such a custom. Bornston as Green (a) was also cited.

BAXLEY B .- I am of opinion that this rule ought to be discharged. The first question in the case exists on the construction of the agreement of demise between the plaintiff and Smith his tenant; vis. whether the agreement operated as a demise for one year only of for a longer period not determinable without a notice to quit. I am of opinion that it created a tenamey only for a single year. The habendum is the proper place to be looked to in order to ascertain the intended duration of the tenancy, because it generally fixes the time fix which the lessor grants that the lessee shall enjoy the demised premises. But I agree with my brother Jone, that you may look at other parts of the instrument; and if you see that the tenancy is to endure for a longer term than that specified in the habendum, the other parts of the lease may control the habendum. But that must be a very strong clear case, in which it must be apparent from those other parts of the least that the parties could not have meant the habendum to have no operation for the time specified by wording. Now in this case the habendum is to half the farm and premises from the 6th April then next "for the term of one year fully to be complete and ended." That in terms is a lease for one year, and one year only. But it is argued, that from other parts of the instrument which seem to contemplate & longer duration of the demise, and to make provisions which could only be applicable to such longer denist; the parties must have intended that the lease was not to expire at the period mentioned in the habendum

hat was to go on for a longer time, until some notice to determine it should be given." Now in order to devide whether this was the intention of the parties or not, and what was their intention as shown by the erasure, we have a right to look at the instrument 'as it originally stood, and at the alterations since made in it, to see how those alterations illustrate the point in questioned The instrument is printed in by far the here which more misterial parts; those printed parts including the stipulations which appear to be incondetent with a tenancy for a single year. It is competant as us to look at what was originally the printed matter, and this at what alterations are introduced in those its original provisions, by erasure or striking set i for these i matters are apparent on the face of the instrument, and we do not go out of it or receiped any parol or other evidence dehors its own merchions. Now the habendum in the printed form med regionally for the term of one year fully to be complete and ended, " and so on from year to year, antilocither party shall give six months' notice to disseive this agreement;" and when I find those words abliturated; then I see on the face of the instrument implithet the intention of the parties making this agreemeds was not that it should continue till six months notive should be given by either party, but that it should determine with the single year, as if "and no more" had been subjoined to "ended" in the habendum. sider myself bound to consider this instrument as a demise for one year only, subject to all the stipulations contained in it applicable to such a tenancy. Those parts of it which were originally introduced in contemplation of a lease lasting longer than a single year, must be considered as having been virtually expunged by the expanging those previous words which would have reised such longer tenancy; consequently I am of opinion that the tenancy ended at the expira-

1864.

STRICKLAND

V.

MAXWELL
and Another.

CASES IN HILARY TERM
HILARY HISTOR SHIT MI

STRICKLAND WAXWELL and Another, tion of that one year, at which period the plaintiff had at all events the immediate right of possession of parts of the farm to which the clause as to way or crops does not apply most homogeneous descriptions.

Secondly, the question what interest, if any, was conferred on the tenant in that part of the premises to which the clause for a way-going crop extended, is not perhaps necessary to be considered in order to discharge this rule: for the defendants acts have exceeded any rights which the tenant Smith could possibly have had under that clause stand though they once offered to give up the possession of all the farm, except that containing the way going crop, upon the plaintiff's complying with certain terms, they, in fact, did not give it up, and withheld the whole. Now by the clause as to the way going crop, the plaintiff agrees that if Smith performs the covenants thereinbefore contained. cording to the true intent and meaning thereof, he should be entitled to the way-going crop. It is not necessary to give any opinion whether the words "in case Smith should have observed and performed the covenants and agreements according to the true intent and meaning thereof," constitute a condition precedent to the tenant having a right to the way-going crop. The language and its position tend strongly to show that they were intended to constitute a condition precedent; but it would be unreasonable that the non-payment of a minute portion of the rent should deprive the tenant of remuneration for his expenses and labour about that crop. But if the tenant is entitled to the way-going crop under the clause, still these defendants were not justified in keeping possession of the land. does not confer on him power to reap the crop of a distinct interest in it, of which he may dispose, any sight to suffer any one to take the crop but landlord It is in reality a provision which enab the out-going tenant to obtain compensation from the

valuation is to be made is not stated, it take place at the time the tenant quits, or ... crop is reaped; but whenever it is intended t, the landlord should be applied to, to apluer to act for him, and that it may be fixed imate of the arbitrators, or an umpire. In: 10 application to value the crop appears to made by the landlord or tenant; the case, stands on this clause as if none had taken as if the landlord were to be entitled to take at a valuation to be subsequently made. landlord might take the crop and do what he h it, when the valuation was made; whereas t, till that takes place, had only a right to do n might tend to improve the crop, e. g. weedbut had no right to lock gates or exclude the except he should deteriorate the crops, or is tenant from doing any thing on the land ous to them. I am, therefore, of opinion that uct of the defendants in locking up not only stead, but the gates of the fields in which the e, and thus preventing the landlord from enm, when he might have had an object in view. reign to injuring the crops, cannot be justified. must therefore be discharged on both points.

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iela propiostanta negata no isiti a bastacan atrakana. rifistrument of demise the tenant had an interest here table ween afficient trument plants by a government agent inglite the listentijofithe pertiesijebleptedifactid sterms weeding it of The printed form originally we respectively and temporary of the contract particular and contract the contract of the contrac year; but on looking, at the interpretted in stands, it appears that before it was signed the i portant words which would create a tenancy for long ,than a near were sarryck out Jam efininion that i my look at the words, thus struck, out, before the strument was executed to see what the intention of parties was in doing, no to The fact of erasure migh proved and explained it and if that fact can he pros an inference may also be drawn from it. The infe bere is that there words, were purposely excluded the parties, in orden to prevent the tenancy from tinning for longer, than a yearn with a words appear me not ambiguous as has been contended had Alexander, but express ; and, therefore, not control this by implication in favour of the grantee ... I this that after having struck out the words originally habendum of this lease, those stipulations which were suffered to remain though only applicable to a tenant for more than a year, became surplusage. right of possession would vest in the plaintiff at the of the year, without six months previous notice Smith to quit, for the purpose of determining his to nancy. As to the way-going crop, without deciding on the alleged condition precedent to the tenant's risk to it, I do not think it can be fairly intended that the tenant should have possession of the crop; he paid value for raising it, and he was to have that value again, not the crop. All deductions from its value is poor-rates, as well as thrashing and delivering it out would be thrown on the landlord or in-coming tenant

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e of whom must harvest it. The out-going tenant, brefore, was under he necessity to go on the land for a purpose of getting the crop; but if he were, that und only give him an easement in the land, without y right in it, and the right of possession is in the idlord. My judgment, however, rests on the plain adding of the instrument in question.

STRICKBAND
V.
MAXWEZE
and Abother.

Grants B.—The terms of the habendum are too ting to admit a doubt, but that the intended tenancy is the subsequent stipulations of the lease was stroyed by the erasure of the previous words, to fich only they could be applicable; at most they will only be applicable if the tenancy lasted for longer and year. On the other point it is clear that, under the value of the way-going crop, he was only entitled that value, and not to the possession of the land on the strong of the land homestead.

Rule discharged (a).

Lord Lyndhurst was sitting in equity, and Bolland B. at nisi prins.

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By order of a baron, made pursuant to 2 Geo. 2. c. 23. s. 23. proceedings in an action on an attorney's bill were staid on payment of what should be found due by the master, without embodying in the order the depay the sum which should be found due on taxation. He, however, signed the usual submission to that effect in the book kept for that purpose at the baron's chambers. On the taxation an allocatur was made in favour of defendant for 6d. That taxation was reviewed under an order granted by and the master then made an allohe defendants request the attachment was . carb with to Rywins against Emureonali yd.,

SSUMPSIT by an attorney for his b baron's order was granted for staying ceedings and taxing the bill, which drawn up without the usual undertaking to p that building in the usual undertaking in the usual undertaking in the usual undertaking in the book kept on the usual undertaking in the book kept out in the usual undertaking in the book kept out in the indeed in the usual undertaking in the book kept out in the indeed chambers. On the interest on the indeed chambers. purpose in the judge's chambers. On the purpose in the judge's chambers. On the purpose in the master made an allocatur of 6d. mission or un-fendant. That taxation was ordered by order of another baron, after a hearing on affidavits. On the reviewed taxation found 18% to be due from the defendant tiff, and made his allocatur accordingly.

> ipton shewed cause against the citie to see cook Heaton for the defendant, moved to set as order to review, which had been made a rule and the master's allocatur thereon, on affidavit ing that the master's finding was incorrect ing fresh facts. A rule having been refused,

the whole sum that apen assumen of the Grompton for the plaintiff, moved for an ment, for not paying the costs pursuant to the p allocatur, on affidavits stating that the costs tha another baron, previously demanded, and that the allocatur an for review had been served on defendant, und

catur for 181. to the plaintiff. The plaintiff made that order a rule of that it on defendant, demanded the costs, and, on non-payment, altrained out without making the original order of submission in the judge's book a rule of -Held, that the attachment issued on insufficient materials, and the sta aside accordingly; but they afterwards upheld another attachment obtains first order and submission had been made a rule of court: both rules in served on defendant, and a fresh demand of the costs outles at motesting At the defendant's request the attachment was ordered by the count of liad in the office for a few days, in order to give him an opportunity to pay the sum in the alocatur.

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RYALLS D. EMERSON.

Heaton then obtained a rule to set aside the attachment for non-payment of that sum, on the ground that so neither the original order to stay proceedings, which had not been made a rule of court,) nor the order to reviewing the taxation, contained any direction to the defendant to pay what should be found due, or say consent on his part to do so, no contempt had been committed. He said that the defendant was been committed. He said that the defendant was not only to plead, and go on in the action. The court remains to plead, and go on in the action. The court remains to plead, and go on in the action. The court remains to plead, and go on in the action. The court remains to plead, and go on in the action. The court remains to plead, and go on in the action. The court remains to plead, and go on in the action. The court remains to plead, and go on in the action. The court remains the plead of the master; but asked whether the original undertaking had not been filed at the judge's cambers.

Crompton shewed cause against the rule to set aside attachment. It is sufficient that the defendant gred the usual undertaking in the book kept at the loge's chambers. For the statute 2 Geo. 2. c. 23. s. 23. rely directs, that upon the submission of the party dargeable by the bill unto a judge of the court, and to pay the whole sum that upon taxation of the said siall appear to be due to the attorney, the judge Will feler the bill to be taxed and settled by the proper Mer." It does hot direct that the defendant's subwhom to pay shall be in the judge's order of referace. Then that submission was properly made in the mok kept at the judge's chambers, that being quasi he record of it, according to the practice upon the words of the statute, "shall submit." If, in very recent instances, at the chambers of some of the learned judges, the submission has, from abundant caution, been in306

RYALLA

serted in the order, it does not appear requisite. I taxation on the second order must be taken to continuance of, and contingent on the first. The mission applies to both equally. The authority of baron, under the act, to make the original order stay proceedings, was proved by the affidavits that asual undertaking in the judge's book was signed the defendant. Then the other baron might deal review of the taxation which had taken place aid the first order, so that any mistake of the officer in be rectified. [Bayley B. If that is so, the day order is not made a rule of court; we do not say ther it is necessary or not. It was not necessary the first order was recited in the second, which made a rule of court, and the breach of which is contempt for which the attachment was moved That order must be taken to have been made a rail court on good authority. Besides, the motion is good faith; being made after the attachment was start in the office, to give the defendant time to buy. units

Heaton in support of the rule. The which practice is, that the defendant's consent should pear on the order itself. [Bayley B. Where I suitor's consent is not obtained, the order is taken a not acted on till the undertaking is entered in book. Then the defendant had no authority to a on the order unless he had consented (a)

Cur. cat. val

BAYLEY B. afterwards delivered the judgment the Court.—This rule sought to set saide an attachment which had issued for non-payment of costs as

⁽a) The learned baron cited Dickins v. Jarvin & B. & C. and 10

RVATES
EMERSON.

that the attachment issued on insufficient materials, and that this rule must therefore be made absolute. To found the proceeding by attachment for contempt some rule of court must be disobeyed. In this case may one of the orders, viz. that for reviewing the exation, was made a rule of court. The allocatur was made on that order only; that is the only rule which has been served, or on which a demand has been made in order to bring the defendant into contempt; but it does not show the terms of the original order, or that there had been a submission in the judge's book. Neither the original order by which the judge's book, were made a rule of court, nor did the judge's book, were made a rule of court, nor did the judge's book, were made a rule of court, nor did the judge's book, were made a rule of court, nor did the judge's book, were made a rule of court, nor did the party to pay.

The party who drew up the original order for taxation must be taken to have consented to that taxation taking place under 2 Geo. 2. c. 23. The defendant will probably act wisely in now paying the money; as think that on making the original order, and the abusission in the judge's book a rule of court, and mying the defendant with that and the subsequent rater for reviewing the taxation, an attachment would

to compel the payment.

Though it has been pressed that the present motion is against good faith, the dates shew that objection to be ill founded; for the attachment was moved for on the same day that a rule for setting aside the order for reviewing the taxation and the allocatur was refused. The Court directed it to lay a few days in the office, in the give the defendant an opportunity to pay; but the could not have been at that time any waiver of the insufficiency of the materials for the attachment, for the defendant could not have had any opportunity

5 & 4 H M 4 ener Inforce of 10s for me-

of knowing what they were. As the attachment on insufficient materials, the rule for setting i RYALIS Would have been made absolute with soft ai by does not pray costs, it must be absolute nithen or tours and The money maid, into court must be returned? athlords Tule about party motion Rule absolute a e verdict, on the ground that the denand sought mus a sol ban . The original order and submission in the Thing a dearn book were afterwards made a rule of court her may man plaintiff served both rules, the allocatur &c., a ad binow mae a"ffesh' demand, whereupon another attacht the plaintiff remits the heart shall be buisted in guine True was then obtained by Heaton to se that attachment, on the same grounds of the insuff of the original order, as materials to support tachment. Crompton shewed cause. Rule disc with costs.

WILLIAMS against WILLIAMS.

writ of inquiry not giving nomarity in tion of the inquiry.

No affidavit of merice in not serving the notice of executing the write the execution of a writ of inquiry for irregular the execution of a writ of inquiry for irregular the the execution of a writ of inquiry for irregular the the execution of a writ of inquiry for irregular the the execution of a writ of inquiry for irregular the write the execution of a writ of inquiry for irregular the execution of a writ of i quiry till the day it had been executed. is set aside on showed for cause that the defendant's affidavit the ground of graffing afficient states and to business in the production of the second of t stated, "that he had merits and a good defence action," and not "that he had a good defence merits," in the correct way (a).

Per Curiam.—No affidavit of merits was re this case, where the plaintiff was irregular ceedings, and executed a writ of inquiry withou the regular notice. Rule abso

(a) See Westerdale v. Kemp, ante, Vol. I. 260; Ofettiek Vi Be & Ald. 703; Doe d. Shaw v. Roe, 13 Pri. 260.

of known a gian day with a latter attachment is not BURLEIGH against KINGDOM, ANTONIO

AT a trial before a sheriff, pursuant to a writ of trial Semble, that if ander 3& 4 Will 4. e. 42. s. 18. the jury gave a vertical issued diet for 202! and 10s! interest. Judyment was signed pursuant to and the whole sum levied; a motion being made to set c. 42. s. 17. a side the verdict, on the ground that the demand sought verdict was to be recovered in the action appeared to exceed 201., and for a sum le was granted conditionally, if plaintiff should not cerest, a judgraimed the 10s. Cause was shown, that by s. 28, of the ment entered up for both statute the jury might allow interest. But, per Curiam, sums would be waless the plaintiff remits the 10s. he might be under irregular. emiderable difficulty should the defendant bring a writ of error (a). Rule discharged, without costs, on the plaintiff's undertaking to remit the 10s. Petersdorff supported the rule, Butt showed cause against it.

(4) See Chevely v. Morris, 2 Bla. R. 1300; Usher v. Dansey, 4 M. & S. 94.

CHILTON against Ellis.

THILTON moved for an attachment for not paying An attachmoney pursuant to an award made under an order be granted fur reference at nisi prius, and for non-payment of the non-payment costs, pursuant to the master's allocatur; but stated of money pursuant to an the demand of the costs was made before the order award, and of of reference had been made a rule of court,

BAYLEY B. (the only judge in court.)—That is not after the order of reference To bring a party into contempt he must be has been made own to have disobeyed a rule of court (b). The de-court. and therefore must be made after the order of referce has been made a rule of court (c).

Rule refused.

(b) See Byalls v. Emerson, ante, 367.

costs taxed thereon, till

⁽c) See 2 Stra. 1178; 3 B. Moore, 64; 1 Chitt. R. 743 (d).

1884.

A phisoner must more to set aside proceedings for irregularity in a reasonable time, though has taken no step since the arrest.

PATHROSE ROUTER BADDELLE 81 on of this kind should be mote actic earliest DUSAY moved to set saide the sapy of and to discharge sendant, out of custody of the sheriff of Aki writ was executed on 4 December ... He conte sa po subsequent step had been taken by the the defendant heing a prisoner was in time. iere, for the planent's more one of the area

in BAYLEY By If the plaintiff had thought f proceeded, the defendent must have until vacation before a judge at chambers, under the and 1 Will. 4. c. 70. s. 12., upon peril of costs. the vacation elapse without putting in bail, an no fresh step has been taken by the plaintiff defendant is a prisoner, he must early in all time, unless be can account for the delay ned. should great the distribute standards ring sentence for

ALIVON and Another against FURNIVA

o di derion parte la .

THE plaintiffs were foreigners residing in who sued on a French judgment, and il rity has been recurity for costs to the amount of 1504 Ad they were nonsuited, but leave being given a enter a verdict for them, a rule was obtaine ingly, and in the alternative for a new trial(a) which

Follett obtained a rule for referring it to the to direct further security to be given, and & proceedings till it was given. The affidavit i after a nonsuit of the motion stated; that the defendant ha incurred 500l. costs.

(a) See the result, post, 751.

Where in an action by a given for costs, in an amount afterwards much exceeded by the defendant's costs actually incurred on the trial, it is too late for him to move for further security for costs and pending a rule for a new

trial.

Bompas Serje, and Manning showed cause. An

~~ application of this kind should be made at the earliest

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opportunity ("But lit is, at all events, too late, being and Apother had after thine joined . Anon. 5 Pre. 610. Reg. Gen. HL 2 Wal. 4. No. 98, Twice, Vol. II. 550.7 provides, Michael she blandiff to give be made before issue Joined." The principle of that rule applies here, for the plaintiffs have gone on to incur marticer botto of examiniting witnesses in France, and italiar emperitive matters, on the supposition that they had wiven security for costs which could be Blackded so to lung a spr. A. China A. W. China the second and given a range of the bail, and though di Polledi tupperted the rule. It would be peculiarly had un the definiont and his attorney, if the general Maley that advertey for costs must be moved for before issue joined, should prevail in this case. The courts, in requiring security for costs from a plaintiff who lives out of their jurisdiction, exercise a discretion merely equitable. Their object is to put both parties en an equal footing as to obtaining costs, if successful. Then it is equally desirable to protect an English defendant, where the security of a foreign plaintiff, which may be sufficient at first, afterwards turns out through to secure the costs incurred.

discount to amount of the contract of the cont miPer Carian. -The application is quite unprecedeated at this stage of the cause.

research of the property. Rule discharged with costs. Militian & State Company mapped the formal to the contract of the south and the

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110: **Proceedings** taken on the bail-bond were stayed, on the terms that it should stand as a security. Subsequently the principal and his bail became severally bankrupt, and obtained their certificates. On motion to have the bailbond delivered up to be cancelled, and to enter an exoneretur on the bail-piece, Held, that as the bankruptcy and certificates of the bail were not disputed, the court would relieve them under the powers of 4 & 5 Ann, c. 16. s. 20. by staying proceedings on the bail-bond, though they would not order it to be delivered up, as the plaintiff was entitled to keep it in order to claim to prove in

d of the bankruptey of their principal, that having place subsequently to the ball-bond being or to stand as a security. But their own bank.

PAIL above not having been builtin in time. elen regently were taken on the Bail-bong, witch staved at the instance of the ball on 19 December on the terms that the bail-bond should stand security. In Junuary 1833 the defendant and in became bankrupts, and at the summer assizes of year a verdict was obtained against the vormer, leave to have immediate execution. The certain of the blat were obtained in July 1833; huar of the fendant, the principal, on 31 August 1853.1 bno n Il be enforced a) The plaintiff's cause of action "Humfied obtained a fulle to show cause win balf-bond should not be delivered up to be Cand and why an excheretur should not be eliteled s ball-piece, on the ground of the bankruptcy b the bankruptcy is not disputed and but adipling conclusive evidence of the trading, act of bank

proceedings against the ball on the ground of principal's bankruptcy; for the ball bond was in to stand as a security before that revent bore to stand as a security before that revent bore of the ball bond was in the proceedings in this action, more than in any other proceedings in this action, more than in any other than the plaintiff has an independent cause of action at the plaintiff has an independent cause of action at the plaintiff has an independent cause of action at the plaintiff has an independent cause of action at the plaintiff has an independent cause of action at the plaintiff has an independent cause of action at the plaintiff has an independent cause of action at the plaintiff has an independent cause of action at the plaintiff has an independent cause of action at the plaintiff has an independent of the plaintiff has an independent commission.

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respect of it under the fiats; and the court moulded the rule accordingly, without calling a bail to pay costs.

ound of the bankruptcy of their principal, that having ten place subsequently to the bail-bond being orred to stand as a security. But their own bankptcy and certificate, though they might be pleaded the action on the bail-hond, afford also a reasonable and for relieving them in a summary way, under power given by 4 Ann. c. 16. s. 20.; for the bankptcy, is not questioned, and the principal is protected his certificate. Now the court is to deal with the il bond, by declaring on which reference is made to original time of its forfeiture. The bankruptcy of heil though subsequent to that forfeiture, does not t an end to it, but merely suspends the period when shall be enforced (a). The plaintiff's cause of action the bail-bond is not such that it might not be med, or a claim, made, to prove in respect of it at a war grown perquent time, if it became necessary. The courts in the habit of thus relieving bail, where, as in this e, the bankruptcy is not disputed; the certificate ing conclusive evidence of the trading, act of bankatex, and petitioning creditor's debt (b). The terms the rule may be moulded to grant such relief as we nk right under the statute of Anne; and will be, that s, proceedings on the bail-bond be stayed.

On Wightman's pressing for costs, stating that he and been obliged to appear in opposition to that part the rule which prayed the bond to be delivered up, he court refused them, saying, that the plaintiff, when betal lightly the rule, should have informed the bail that he would agree to a stay of proceedings, but not to the other terms of the rule.

Rule absolute to stay proceedings on the bail bond (c).

1884. SLATTER 91.

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> Acres 6 May

⁽a) See 6 G. 4. c. 16. s. 52.

⁽b) 6 6:4 c. 16. s. 126. B G. 2. c. 30. s. 7. 13.

⁽c) See Bottomley v. Medhurst and Another, Maclelland's Rep. 399. In Stopleton v. Macher, 7 Taunt. 591, Gibbs C. J. says, "The rule is, that bail

-SLATTER I - Scorrall

happ by a legislar judgernit shall not be relieved in case of the h of their principal, unless at the time when they were fixed, the fifth of the street o Welle'n Relt, the phintipars certificate had not been the borner collers i Bres Chiana vs. Liming, L. Bilike C. The st Worther alt a et ele Petrantes Mesmissan Propriete 14 Petrantes ii . noi: ie vacation of which the declaration was debiind then to proceed with a reasonipt or copy of claration and subsequent proceedings in the to on sham Rouncity against Bower sust

In order to satisfy the court under 2 & 3 Will. 4. c. 39. s. S. that proper means have been taken to serve a distringas on a defendant, who was a clerk in the victualling office, in order to enter an appearance against him, it should be shown not only that his residence or property could not be

DERE moved to enter an appearance to ि हिंभी बेंभर पंतावेंसे १ के उन्हों में टां उन्हों है। जी इ to satisfy the court of that due and proper his been taken to serve and execute the distring produced an affidavit that the defendant was in the victualling office, but that the plaintiff ha unable to discover his place of residence, or a perty belonging to him, on which to distrain; due diligence had been used to execute the will but without success. But, per Curion, It de appear that inquiries were made at the viet office, in office hours, when the defendant won bably have been to be found there, of that aftempts have been made to serve the writ? her barons consuled d there.—Rule refused. discovered, but that attempts had been made to serve him at the victualling

> 11. 17. 1 12 To to

DICKENSON against REYNOLDS.

THE declaration was delivered on 2d December The declaration was deli-Michaelmas term. The plea was deliver vered in Michaelmas vaca-

of that day, (being the first day of Hilary term). The issue was made delivered as of Michaelmas term. The court refused a motion to set it aside being made up of Hilary term; as the plea might have been delivered before ting of the court on 11 January, and no damages appeared from the issue b tered of Michaelmas term.

I The fanally, entitled on that day. The issue, however, a made up as of Michaelmas term, instead of this term. Chilton moved to set saide the delivery of the issue. conbuiling, that when the issue is of the same term with the declaration, it ought to begin with the term in which or in the vacation of which the declaration was delivered, and then to proceed with a transcript or copy of the declaration and subsequent proceedings in the present tense? but that if the issue is made up of a subscapent term, then after mentioning the term in 9r of which the issue is, joined, it should state, in the past tense that the plaintiff, on the day on which the declatation was delivered, complained &c., setting out the declaration and subsequent pleadings him or handson wind in the victinating office, but that the plaintiff had been BAYLEY B. The plea is not entitled of the first day of Hilary term, but on the 11th January. That have the issue to be properly, made up as of Michael. term. For all that appears, the plea might have delivered on the 11th January before the Court actually sat, and the term began; Pugh v. Robinson (a). Beides, as you do not show yourself prejudiced, we quant not to interfere to set aside the proceedings. The other barons concurred. Bought of the grade Rule refused.

Ð. REYNOLDS.

1. 1. 1. 1.

(4) 1 T. R. 116. See 1 Br. & B. 379; 10 B. M. 194; Macl. & Younge, 202; 6 B. & Cr. 197; 2 D. & B. 868.

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the sum actually paid, and that not exceeding one shing per aide, except to be special vir answares.

Directions to Taxing Officers as to all Write inhall

In all actions of assumpsit, debt, or covenant where the sum recovered or paid into court, and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed twenty pounds (without costs), the plaintiff's costs shall be taxed according to the reduced scale hereiand annexed.

Provided, that in case of trial before a judge in one of the superior courts, or judge of assize, if the judge shall certify on the postea that the cause was propulate to be tried before him, and not before a sheriff or judge of an inferior court, the costs shall be taxed upon the usual scale.

At the head of every bill of costs taken to the taxing officer to be taxed, it shall be stated whether the recovered, accepted, or agreed to be paid, exceeds the sum of twenty pounds or not, in the following form

Debt above 201.

Debt 201. or under.

Three shillings and fourpence shall be allowed for both drawing the judgments in all cases.

The officers of the court of Exchequer are to show no incipiture of judgment upon paper, and are to the the costs upon the postess.

Every brief sheet is to contain eight folios at the least, which are to be paid for at the rate of six shillings and eightpence par sheet for drawing, and three shillings and fourpence for copying; such parts of the briefs only as are really drawn to be allowed as drawing. The rest to be allowed as copying.

The allowance to witnesses for travelling is to the

sum actually paid, and that not exceeding one per mile, except under special circumstances. E stird outsel is to be will end on write of triell rials before that judge of the sheriff's court on, or of other courts of record, where at-transpers to their naturals. It is not allowed to practise, and then one guinea re not allowed to practise, and then one guinea accept the street of the properties of to be allowed to counsel's clerks are not to made. (wegry popules without costs); the plaintiff's cost paides her are ordered the reduced used to be of s and under twenty guineas meas and upwards (in 1 to och af unit 10 10 0 1 sees clerk on consultation - 0 7 6 sees clerk on consultation - 0 17 6 sees clerk on consultation - 0 17 6 sees clerks on ditto; each Puril control of the letter additional and the second of t to be tried before him, and not before a sher judge of an infaret, size of infallential shall be apon !कि करफोर ज्यान re action, if sent **14 th**e Beat efference bill of cosistaken **(84)84** officer & Ob Jaxed, wishaif he Stated whether th recoverged, accepted, or agreed to be paid estoni of the and bettaming our in 'tou an spuinoù Anbail pa une ba en mouse. s for declaration \()(+ 920d), 1d9(1 me at one shilling per foliogic adoct replies differ some founding sould be something the sould be the sould be something the sould be something to the sould be sould rticulars and copy space the main surginal wit goodwords I let officers of the cours of Exchequer are the ine ine infinite of judgment appet paper, and are in me of whatever length the costs upon the postgas Process the process of the process o least, which are to be paid for at the rate of six shi While the Calife is tried before the Storige conquite is bus stilling chart a pair quared and applied for 1280 illus brief Dong Les et en de de commente allowed assirt The garages of his poster of obligation in 1'lle filowance to viscoustes fravelling is 1

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1834.

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1834.

same vacation til. Vicesty var pleased in the same vacation of the last representation of the little of the last representation o

MEMORANDA.

In Trinity vacation 1833, John Balguy of the Temple esq., was appointed one of his Majesty's and took his seat within the bar on the first Michaelmas term 1833.

In the vacation after Hilary term 1834. Mr. Bayley retired from his office of a baron of chequer, and was on that occasion created a of the United Kingdom (a). He was succeeded 28th February hy John Williams esq. K. C. been previously called to the degree of Serjeam been previously called to the degree of Serjeam

and had godd dings with the motio "Thilla legum."

Mr. Baron Williams was afterwards knighted.

1834.

VEGGUE WAS DELIGHBLINED IN THE

About the same time, Sir William Horne resigned the dide of his Majesty's Attorney-General, and was succeeded by Sir John Campbell, his Majesty's Solicitor-General. Charles Christopher Pepys esq. K. C., succeeded Sar John Campbell; in the (latter office; and was highted.

In the same vacation Mr. Serieant Jones received his Majesty's licence to assume and bear the surname of the will of his late maternal unde.

In the same vacation his Majesty was pleased by his himphratent and grant the dignity of a Baroni of the which hingdom of Great: Britain and Ireland to the light Hotorable: Sir Whatias Denmin Knight, Chief Justice of the court of King's Bench, and the lights make of his body lawfully begotten, by the name, style and title of Baron Denman, of Dovedate in the county of Derby.

1834.

Early in Easter term, Mr. Justice Parke, Mr. Justice Alderson, Mr. Baron Vaughan, and Mr. Baron Vaughan, resigned their seats in their respective courts. It is a part of the court of King's Bench in the room of Mr. Justice James Parke, and Mr. Justice James Parke and Mr. Justice Barons Vaughan and Williams. Mr. Baron Vaughan succeeded Mr. Justice Alderson as a judge of the court of Common Pleas, and was on that occasion appointed a Member of his Majesty's Most Honorable Proy Council. The above judges took their seats accordingly in their respective courts on 29th April 1844.

.1884.

reinafter named, being Serjeants at this present time actual practice in our said Court of 4 pum in Press.

On Friday the 25th of April, in this term is following warrant was read by the officer of the Country and ordered to be entered of record:

208, Henry Stocker Chemics "" WILLIAM, R. **eury Joha Stephen, Charasta** WHEREAS it hath been represented to the would tend to the general dispatch of the business m pending in our several Courts of common law at Ma minster, if the right of counsel to practise place be heard, extended equally to all the said Courty to such objects cannot be effected as long as the Series at law have the exclusive privilege of practising, pl ing, and audience, during term time, in our shiput Common Pleas at Westminster: We do therefore he order and direct that the right of practising, ple and audience, in our said Court of Common Pleas du term time, shall, upon and from the first day of This term now next ensuing, coase to be exercised exc sively by the Serjeants at law; and that, upon an from that day, our counsel learned in the law and other barristers at law, shall and may according to their respective rank and seniority, have and exempt equal right and privilege of practising, pleading, audience in the said Court of Common Pleas at West minster, with the Serjeants at law: And we do hereby will and require you to signify to Sir Nicolas Conynghan Tindal, knight, our Chief Justice, and his companions Justices of our said Court of Common Pleas, this ou royal will and pleasure, requiring them to make prope rules and orders of the said Court, and to do whateve may be necessary to carry this our purpose into effect And whereas we are graciously pleased, as a mark c our royal favour, to confer upon the Serjeants at las

reinafter named, being Serjeants at this present time actual practice in our said Court of Common Pleas, me permanent rank and place in all our Courts of law dequity; we do hereby further order and direct that working Lawes, Thomas D'Oyley, Thomas Peake, William St. Julian Arabin, John Adams, Thomas Ansus, Henry Storks, Ebenezer Ludlow, John Scriven, enry John Stephen, Charles Carpenter Bompas, Edid Goulburn, George Heath, John Taylor Coleridge, d Thomas Noon Talfourd, Serjeants at law, shall henceforth, according to their respective seniority songst themselves, have rank, place, and audience, in our Courts of law and equity, next after John Esq., one of our counsel learned in the law: we do hereby will and require you not only to this our direction to be observed in our Court of annery but also to signify to the Judges of our other Courts at Westminster, that it is our these pleasure that the same course be observed in For said Courts. Given at our Court of St. James's. Ach day of April, in the fourth year of our reign. bus magas tama เกียก London superior

To the Right Hon. Henry Lord Brougham 01 war, Lord High Chancellor of Great Selection and area of Persons into a common secure com-Section 18 hours ban antino a second dwill a great opposition to a great control Throng of the track of the property of the The first section BOOK TO SHEET OF THE SECOND Street Contract The contract of the contract o 19830 Toleran Tolerand Bert TOTAL PROGRAMMENT OF THE STREET At the property of the state of the second Booker and the state of the state of the state of

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with the more of the contract of the when their ELIZABETH SHERIFF RUSSEL against ROBBETS ILICHARAN, NATHANIEL NICHOLLS, and El Russel, spinster, MARY Russel, spinster !! BETH RUSSEL, spinster, ELLEN RUSSEL 1919 and JANE Russel, spinster, infants under the twenty-one years, by Andrew Buchanan ... guardian. di Do .

BY order of the Vice-Chancellor the following was sent for the opinion of this court:

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R. B. devised freehold premises to his wife during her life or widowhood, and after her death or marriage, to his nephew R. B. R. for life, and from and after his and equally between all and every the children of his said nephew R. B. R. law-

Robert Brown, late of Streatham in the co Surrey esq., deceased, was at his death possessi very large personal estate, and was also in his li and at the time of making his will hereinafte tioned, and from thenceforth, and at the time death, seised in fee simple in possession of and in decease "unto hereditaments and premises, and amongst others in a certain mansion-house, and certain mes lands, and hereditaments, situate at Streatham aic fully begotten, their heirs and assigns respectively, as tenants in common," than one, and if but one, then to such only child, his heirs and assigns; but there should be no child or children of his said nephew R. B. R. livingue: of the decease or marrying again of his the testator's said wife, then he devi to his executors in trust for other persons. The residue was devised to other persons. By codicil dated and executed on the same day as the " attested so as to pass real estates, the testator directed "That neither R. B. R., nor any or either of his issue, shall by virtue of this my will, take of sidered as entitled to a vested interest or interests, unless and until they shall requestion the age of 21 years." R. B. R. the nephew attained 21, married, had in the lifetime of the testator's widow, and survived her, as did his children? death he entered into possession of the devised estate, and afterwards died five children surviving him, all infants; and having by will devised all freehole of which he might die seised, and over which he might have a disposinging certain persons, upon trusts mentioned in the will:—Held, that the devise tuted by the will for those previously made to the children became void, to contemplated not having happened; and that the estates devised to the the the will being rendered contingent by the codicil, failed of effect for want of

ticular estate of freehold to support them at the death of R. B. R.; so that

passed by the will of the testator's heir at law.

RUSSEL

v.

BUCHANAN
and Others.

hereinafter mentioned; and being so seised, the Robert Brown did, when he was of sound and dising mind, memory, and understanding, and on the heavy of March 1814, duly make and publish his will and testament in writing of that date, and chi was executed by him, and attested so as to pass hold estates of inheritance, whereby, after certain aests, he gave and devised to his wife Susanna mon, all that his capital mansion-house, with the is, tenements, and hereditaments thereunto belong-, and wherein he then resided, situate at Streatham the county of Surrey, which he had purchased of d William Russel, together with all the new buildand additions made thereto, and all other his sauages, lands, tenements, and hereditaments whatver, at Streatham aforesaid, to hold the same unto said wife and her assigns for and during the term of patural life; provided always, that in case his said ie should at any time after his decease marry again, in the said testator did thereby absolutely revoke, mul, and make void all and every the devises and quests in his said will contained in her favour, and weed and in lieu thereof he gave and bequeathed to mexecutors of his said will, and the survivor of them, executors and administrators, for and during the and of the natural life of his said wife, the annuity in be said will mentioned; and from and immediately her the decease or marrying again of his said wife, the testator gave and devised to his nephew Robert Brown Russel, all those his said capital and other mesrages, lands, tenements, hereditaments, and premises hereinbefore mentioned, situate and being at Streatham Moretaid, with their appurtenances, to hold to his said when Robert Brown Russel and his assigns, for and during the term of his natural life; and from and after the decease of his said nephew R. B. Russel, the said

RUSSEL O.
BUCHANAM and Others,

testator gave and devised the said capital and rether mossuages, lands, tenepients, hereditaments, and store wises at Stressburg aforessid, with their appurtenances. Sunto and equally between all and every the children of his said nephew R. R. Russel lawfully begotten their heirs and assigns respectively, as tenents in Comme and not as joint tenants, if more than one and if then should be but one child, then the whole to such sull child, his or her heirs and assigns;" but, in case there should be no child or children of his said replace R. B. Russel living at the time of the decrease or many ing again of his the testator's said wife, then he game and devised the said capital and other messurers, lands tenements, hereditaments, and premises at Streathers aforesaid, unto his said executors, and the survivor of them, his executors and administrators, in trust [and for the sole and separate use and benefit of his that testator's niece Mary Russel, exclusive and independent of the control, debta, or engagements of any husband or husbands she might happen to marry; and from hall after the decease of his said niece Many Rauschille trust for all and every her child and children lawfullato be begotten, if more than one, their respective being and assigns, as tenants in common and not assigns tenants, and if but one child, then in trust for such original child, his or her heirs or assigns; and in case of this respective deceases of the said Robert B. Retriel and Mary Russel, without leaving any child or children shall should be living at the decease or marrying again of his the said testator's said wife, then he gave and devised his said capital and other messuages, lender tenements, hereditaments, and premises, with the purtenances at Streatham aforesaid, unto and equal by between Robert Coster, John Coster, and Mary Accept Squarrey, the children of Robert Coster and Haves Goster, their heirs and assigns respectively, as tenants

RUSSEL P.
BUCHANAN and Others.

is common and not as joint tenants. And the said libert Brown, by his said will, gave and bequeathed betost, residue, and remainder of his estate and effects bissever and wheresoever, and of what nature or hind soever, from and after the decease or marrying again of his said wife the said Susanna Brown, which should first happen, into and between his said nephew Brown Russel, and his said niece Mary Russel, spinster, in equal shares and proportions, share and shares ulike, with divers bequests over of such residuary cutate and effects, upon certain events which did not happen, for the benefit of the children of the said Robert Brown Russel, and Mary Russel, spinster, and of the said Robert Coster, John Coster, and Mary Ann Squarrey.

The said Robert Brown afterwards, on the same 18th day of March 1814, and when he was of sound aid disposing mind, memory, and understanding, duly mile and published a codicil or instrument in writing d that date to his said last will and testament, and which was executed by him, and attested so as to pass hesheld estates of inheritance, and which codicil or in writing is in the words and figures folwing, that is to say, "This is a codicil to my foresting will. It is my will and mind, and I do hereby Greet that neither the said Robert Brown Russel nor Many Russel, nor any or either of their issue respecthely, nor the said Robert Coster, John Coster, or Mary An Squarrey, nor any or either of their issue respectively, shall, by virtue of this my will, take or be convidered as entitled to a vested interest or interests, voless and until they shall respectively attain the age of twenty-one years; and in case of the death of any one or more of such children under such age, then the here of such child or children so dying shall go to the surviving brothers and sisters, or brother or sister, as

The said Robert Brown, shortly after the execution of his said will and codicil, and in month of March 1814, departed this life, withou in any manner revoked or altered his said will o save as the said will may be revoked by the said and without having in any manner revoked or the said codicil, leaving the said Susannah B widow, and Robert William Brown his only heir-at-law, and the said Robert Brown Ru Mary Russel, spinster, respectively him surviving said testator Robert Brown was not, at the re times of making his said will and of his death. any lands, hereditaments, or premises, other ti except the said mansion-house, lands, heredit and premises at Streatham aforesaid, and certa hereditaments by his said will specifically dist in manner therein mentioned. The said" Brown his widow never, after the death of it testator Robert Brown, intermarried again or the wife of any other person; and the said Brown, widow, upon the death of the said Robert Brown, under and by virtue of the sa entered into the possession of the said mansion lands, hereditaments, and premises at Streathin said, and into the perception and receipt of the and profits thereof respectively, and she conti

The said Robert William Brown, the said testator Robert Brown's heir-at-law, departed this life in the lifetime of his mother, the said Susanna Brown, widow, without issue and intestate, and without having done or joined in doing any act in law whatsoever for the purpose of conveying or assuring away, or for the purpose of charging or incumbering any right, title, or interest of or to the said capital mansion-house, lands, breditaments and premises at Streatham aforesaid, or of or to the rents and profits thereof respectively; and the said Robert William Brown left the said Robert From Russel, his cousin and heir-at-law, him surviving, and who, upon the death of the said Robert William Brown, became the heir-at-law of the said testator Robert Brown.



The said Robert Brown Russel, after the death of the mid testator Robert Brown, and during the lifetime of the said Susannah Brown, widow, intermarried with the plaintiff, then Elizabeth Sheriff Buchanan, spinster, and there are issue of such marriage five children and no more, namely, the defendants, Frances Russel, spinster, Mary Russel, spinster, Elizabeth Russel, spinster, Eller Russel, spinster, and Jane Russel, spinster, who reall infants under the age of twenty-one years, and were all born during the lifetime of the said Swanneh Brown, widow; and the said Frances Russel the eldest of such five children, and is of the age of thirteen years or thereabouts, and the said Robert From Russel never had any other child or children except the said defendants, his five daughters, as hereinbefore mentioned.

Upon the death of the said Susanna Brown, widow, the said Robert Brown Russel, who, during the lifetime of the said Susanna Brown, widow, had attained his age of twenty-one years, under and by virtue of the said will and codicil of the said testator Robert Brown,



and being such heir-at-law, entered into the possession of the said capital mansion-house, lands, tenements hereditaments, and premises at Streathern aforestic and into the perception and receipt of the rents are profits thereof; and he continued in such possession and in such perception and receipt, down to the times his death hereinafter mentioned.

The said Robert Brown Russel, during the time h was in such possession and in such perception sai receipt as aforesaid, and when he was of sound and dis posing mind, memory, and understanding, and on the 13th day of April 1832, duly made and published his last will and testament in writing of that date, and which will was executed by him and attested so as to pass freehold estates of inheritance; and he therely. after bequeathing certain pecuniary and specific legacies. gave, devised, and bequeathed all his freehold; and copyhold estates of which he might die seised or posseased, and of or over which he might have a disposing power, and all the rest, residue, and remainder of his personal estate of which he might die possessed of whatever nature, and wheresoever situate at the time of his decease, and over which he should then have a disposing power, to his wife the plaintiff, Elizabeth Sheriff Russel, late Elizabeth Sheriff Buchanan, spinster, the defendants Robertson Buchanan esq., and Nathania Nicholls, merchant, and whom he by his said will appointed the executrix and executors thereof, and in the survivors and survivor of them, her or his helps executors, and administrators, upon certain trusts. the said will mentioned, as by such will, reference being thereunto had, will appear. Which mid will is also to be taken as part of this case, and reference to any part thereof, not herein set out, may be made upon the argument by the counsel for any of the parties.

The said Robert Brown Russel departed this life as

the 26th day of April 1832, without having revoked or in any way altered his said will, leaving the said plainthe Elizabeth Sheriff Russel, his widow, the said defendants Robertson Buchanan, Nathaniel Nichols, and the said defendants, his said hereinbefore mentioned five infant daughters, his only children and coheiresses at law respectively, him surviving; and the said defendants Frances Russel, spinster, Mary Russel, spinster, Elizabeth Russel, spinster, Ellen Russel, spinster, and Jane Russel, spinster, are the coheiresses at low of the said Robert William Brown, and of the said testator Robert Brown. The said Elizabeth Sheriff Russel, widow, Robertson Buchanan, and Nathaniel Nicholls have, since the death of the said Robert Brown Russel, duly proved his said will in the proper Ecclesiastical court, and they thereby became and are now his legal personal representatives. The said Elizabeth Sheriff Russel, widow, on the 6th day of November 1832, exhibited her bill of complaint in his Majesty's high court of Chancery at Westminster, against the said Robertson Buchanan and Nathaniel Nicholle, and against the said Frances Russel, spinster, Mary Russel, spinster, Elizabeth Russel, spinster, Ellen Russel, spinster, and Jane Russel, spinster, stating and praying to the effect therein mentioned. And the said several defendants having respectively appeared to and put in their respective answers to the said bill, the said cause came on to be heard before his honor the Vice-Chancellor at Westminster, on the 29th day of January 1833, when his honor, amongst other things, was pleased to direct a case to be made for the opinion of this honourable court upon the following questions, viz.

First, whether the said Robert Brown Russel took any and what interest in the said capital mansion-house, lands, tenements, hereditaments, and premises at Streathern aforesaid, or in the rents and profits thereof,

RUSSEL
v.
BUCHANAN
and Others.

RUSSEL V.
BUSHANAH and Others.

under and by wirtue of the said will and codiction testaton Robert Brown or as the heir-at-ham of the Robert William Brown, on as the heir-at-last st said testator Robert Broton Hard will be trove add Secondly, whether the said defendants Axances A spinster, Mary Russel, spinster, Elizabeth Russel, ster, Ellen Russel, spinster, and Jane Russel, spin the infants, now take any and what interest in the capital, mansion-house and lands, beneditaments premises at Streathern aforesaid, of in the nexts profits thereof, under and by virtue of the said wil codicil of the said testator Robert Brown, stress heiresees at law of the said Robert William Brown Thirdly, whether the said Elizabeth Shariff A widow, Robertson Buchanan, and Nathaniel Nia now take any and what interest in the said see mansion-house, lands, hereditaments, and premise Streatham aforesaid, or in the rents and profits, the under and by virtue of the said will of the said R

Preston for the heir at law. First, the mile Robert Brown, taken per se, obviously vested in children of Robert Brown Russel an estate in the tenants in common at the death of their fathers tenant for life. Secondly, none of the ulterior evel designated by the will as competent to defeat destates even occurred; for the children of Research were living at the death of Research will be residuary days an operation; for though such a clause may an operation to pass whatever is not before a tually given by the will, yet, where precedent in the will have disposed of the whole properficctually, nothing remains on which it can

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time from which the will speaks and takes muthe testator's death, though his intentries resithings stood at the time of making it vent of the birth of Robert Brown Russel w high, according to the will occasions the be ultimate devises, happened subsequently asor's death. Doe d. Morris v. Undera ruling case to show that a residuary claim! Mi where the will previously disposed of the erty. ... There the testator devised lands to C., and D. attained their respective ages of and then to B., C., and D. and their heirs. be divided between them as tenants in parged with the payment of an annuity of C, and D. equally and proportionably out eral estates, and devised other lands to A." then gave all the rest, residue and rehis real and personal estate, not before given; heirs, executors &c., and directed that his should be paid out of the estate given to A. died before the devisor, but if he had lived attained twenty-one at the time of the tres-It was held, that the devise to ectment. paed devise, and that B.'s share not being by the will went to the heir at law of the t to E. his residuary devisee; Willes C. J. own (p. 297) that when a testator in his will sway all his estate and interest in certain at if he were to die immediately, nothing adisposed of, he could not intend to give in those lands to his residuary devisee. us cases of Roe v. Fludd(b) and Wright v. Eq. C. average His

R. 154. stated also in Willes, 300; and see 8 Vin. Abr. 195, ...); & Cguise's Digest, 3d edit. 145; but see as to this case, 1, 1 Ves. 420, Willes, 303; Gulliver v. Wicket, 1 Wils. 105, 4th edit.



with reference to the possession only; wherea desired to express a contingency, he could not more apt terms. By the express words of the not any or either of the issue of Robert Bre sel are, by virtue of the will, to take a " vested unless or until they shall respectively attain t twenty-one years. By a "vested" interest that which is directly contrary to a "conting terest, and those words must receive the techn struction which they bear. Every one who has estate or vested interest, has somin in law o But as the testator conferred vested estate will, he must, under the wording of his c taken to have meant to render them continge event of Robert Brown's children respectively twenty-one, by suspending the time when the have vested by the will till those events happe to exclude them from enjoying the rents till the so, the children's interests were made conting codicil; then,

Fifthly, by the death of their father, Role Russel, before they attained twenty-one, the or union of his particular estate for life wittook place, and the contingent remainders, the children were defeated for want of a state of freehold in trustees to support the

RUSSET.

v.

BUCHANAN
and Others.

1884.

consequence is, that Robert Brown's devise over of the Streathum estate failed; and it passed by the will of Robert Brown Russel, his heir at law, to his widow Elizabeth Sheriff Russel and his two other trustees and executors, in trust for his widow for life, and to his children in fee after her death. The latter, therefore, sustain no further injury than the interposition of their mother's life interest: [Lord Lyndhurst O.B. The whole question turns on this point, whether by the words of this codicil the children took a vested or contingent interest only?]

Goldridge Serji, appeared for Nathaniel Nicholls, the trustee and executor named by the will of Robert Brown Rules!

LEUF: Rudall for the children of Robert Brown Russel. First the children of Robert Brown Russel take vested whates in fee in possession under the will, as tenants in common; subject however to this operation of the coancil! that in case of the death of any of them under wenty-one, the share of the deceased would be devested in favour of those who attain that age. his wever, contended that by the codicil the shares belame contingent on the event of attaining fall age. But not testamentary disposition is ever construed to make an estate contingent which can be held to be wested, nor, if it can be avoided, to create an intestacy. The whole difficulty here arises on the codicil: then the Court will look at the whole scheme of the testathe's disposition, in order to discover ground for supbirting the will. The codicil was only intended to The ply that provision for the event of any death among the children before attaining full age, which had been omitted in the will. Then did the testator, by his codicil, intend to make the vesting the shares contingent

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of the vattainment of twenty-dne years as an condition precellent / or merely to postnone till that age itheir night of possession of the charas already vested in their da hildren should depend, not on the excut flighteds of It is aubmitted that the intent of the dedicit warms to invalidate the whole previous dispositions of chistal as to this property, by suspending the time wherbill alianess were to vesturbut only to postpone thanks When the children were to be entitled to presented By the tested interest interest interest task ing in possession not in interest. But Dotd Albertle observations in Wadley no North (a) show, that the mou tion by the testator of the age at which the life wind but the devisees in possession, afforde a presumation kinat he meant merely to apostpone the time when the -were to have possession of the shares, and monto die Atherstine when they were to vest. At the then then the shares already vested are to become indefeasible in -how bould the codicil give the shares of those whosh under twenty-one to the survivors; if nothing westide any of them before that lage? ... Supposing this shi witten's estates to be held not wested at their bitther ha only contingent on attaining twenty-one, then if Related Brown laused had survived Mrs. Brown having & thet time as child or children who afterwards dishivhis lifetime; but before attaining twenty-chelde lissue, heither the latter, nor even the substituted sie wises could have taken; for the event limited shade -will, vizuifind child of Robent Brown Raissel should oliving at the decease of Mrs. Brown, would not less · happened | Doe w. Cook (b). Doe w. Rambing (clisted Shaldham v Smith(d) And if all the vesteres Again, had the testator meant the estates of Ribs Brown Russel's children to be contingent on attaining

⁽a) 3 Ves. jun. 367.

⁽b) 7 East, 269.

⁽c) 2 B. & Ald. 441.

⁽d) 6 Dow's P. C. 22,

1634 RUSSEL BUCHANAN and Others

twenty-one; and not to be vested the would shave made some prevision neltditheraccruing restspand would have priorided that the limitations rever to Many Russel's children should depend, not on the event offithese being mi schild of Robert Brown Russeli living at the firsthilofo Munita Brown, shut von the event of literatich elildrattaining twenty-lone, - "Though of vested? is an technical wood; yet when found in a will, it will require that technical be untechnical interpretation which will best support the testator's intention will Kanchamp & Hell(x) Sir John Ledch M. R. said, Wif, by giving to the words which a testator has fused, their literal and tests likely effecty: indonsistent and (alienrd) conclusions must miseasily follow, and if by understanding such words under ladge by the whole will be refidered more mitional with cornistent; the court! which departs show the li-"tital and technical sense of the words, does not adopt radinjecture its supposed to expressed intention; but these sicourse to a sound rule for collecting what is the inriention which is really meant to be expressed." [Lord - Ligadhierst C. Bui Phat applies where the intention mot the use the technical word in the technical sense clearly only contingent on attaining twenty canc, that it helent in Lindstever mannel the codicil may be construed; it winder be bear us one entire instrument with the will (4). married large bere where they are of the same date. By -the will ithe children of Robert: Brown Russel would sconfeheldly take vested estates in Then ble opdioil strained in the nature of a condition subsequent, noatpolition the right of postestion, and disesting it he tatates of those of them who should die under full age. And if all the estates are rendered contingent by the 'wildil; its words " unless and until they shall respec-

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Bearing Research a find the first security of the officers of the second

⁽a) 6 Madd. (or Madd. & Geldart's Rep.) 346.

⁽b) See ante, Vol. III. 921, 922, Doe v. Meyrick.

⁽e) Hall v. Chapman, 1 Vcs. jun. 407.

RUSSEL

RUSSEL

BUCHANAN
and Others

tively attain twenty-one," mean when or if they attain that age (a). In Edwards v. Hammond (b), a copy holder surrendered to the use of himself for the and after his decease to the lise of his eldest son John Hammond and his heirs wif it shall happen that the aforesaid John Hidmmond shall live until He attain the age of twenty-one years; provided always, and under the condition nevertheless, that if it shall happen that the aforesaid J. Hammond shall die before he attalh the age of twenty-one years, then to remain to the use of the surrenderer and his heirs." The court held, that though by the first words this might seem to be a condition precedent, yet, taking all the words together, it was not a condition precedent, but a present device to the eldest son, subject to and defeasible by this condition subsequent, viz. his not attaining the age of Now though a devise in those terms would be contingent if standing alone, Johnson V. Gabriel (c); yet being followed by a devise over to the survivors, in case any of the devisees die under age, the latter limitation explains the sense in which the words of contingency were used to be, not that of the porting a condition precedent to the vesting of the estate under the first devise, but a condition singlequent, on failure of which their estate may be develted; not a description of the time when it is to vest in and be taken by the children, but of the time when the estate already vested in them is to become indelisible (d). That doctrine appears from several the

⁽a) See Boraston's case, S Co. 10; and Script, Williams's arguales, i New R. 818.

⁽b) See the record in this case, Browfield v. Crowder, 1 New R. 31. a. 3 Levinz. 132; S. C. 1 Watkins on Copyholds, Vidal's ed. 312.

⁽c) Cro. Eliz. 122.

⁽d) See Marryat's argument in Doe v. Novell, 1 M. & S. 331.

Russel v.
Buchanan and Others.

Edwards v. Hammond was supported in Doe d. Wheadon v. Lee (a), Bromfield v. Crowder and others (b), Pas v. Moore (c), Doe v. Newell (d), and Farmer v. Errocie (4). In Doe v. Moore, which nearly resembles this case, Land Ellenborough states the rule to be, that a device to A. soken he attains twenty-one, to hold to him and his heirs; and if he die under twentyone, then over, does not make the devisee's attaining twenty-one a condition precedent to the vesting of the interest in him, but the dying under twentyone is a condition subsequent, on which the estate is to be devested;" and that whether the devise over be immediate or in remainder only. But Montcomerie w. Woodley(f) bears strongly against the construction that in this case the estates were rendered postingent by the codicil. The testator there devised trustees and their heirs to the use of his grandson . C. M. Montgomerie for life, with remainder to his first and other sons in tail male, with remainders in strict settlement to grandsons yet unborn; and to this me added a clause, directing that none of the devisees samed should take or come into possession of any of his estates before they should have attained the age of . Syenty-five years; and Lord Chancellor Eldon held, that the testator did not mean to postpone the time at i, which the estates were to yest, but only that when the devices were to come into possession. Secondly, as there is no devise over in the event of all Robert Brown Russel's children dying under twenty-one, if that should happen, no one of their estates could be devested; for the rule applies that estates once vested shall never be devested, unless all the events take effect on which the devesting is made to depend; Stur-

⁽a) 3 T. R. 41. (b) 1 New. R. 321. (c) 14 East, 601.

⁽d) 1 M. & S. 327; S. C. Dom. Proc. 5 Dow, 202; see Ld. Wynford's judgment.

⁽e) 2 Bing. 157; 9 B. M. 316.

⁽f) 5 Ves. 52%.

480

Russet!
v.:
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gess M. Pearson(a) Harrison v. Foreman (b) Thirt the word " surviving?" in the codifile must be ru "other," so as to vest the shares of such children shall die under twenty-one in all who attain that ag Pattywood ver Gook (ch. Harman ve Dichenson (d) of motors Wilmotale) a Barlow was Salter (f) sur Folisthly and devise is to a class, and it being dearly intended th no child dying under twenty-one should take any h nefit, the clause of survivorship in the codicil must pe the according as well as the original shares: For Sit. Leach M. R. in Barker v. Lea (g), after stating thou negalirule to be that the clause of survivorship male extended thy particular words, attaches lonly to a original shares, and does not affect the accraing sham which therefore become vested in the individual and and the survivors for the time being, declares the hein pel exception to be, where the dispositionois said ! separata legacies, but of one aggregate famili whiches testator meant should remain an aggregate fundin a should not be broken into fragments, if some leftl persons, to whom interests in it were given, happen to die. That devise was of real as well as pelice property; and the principle laid down applies to fatt Though: Woodmard v. Glassbrook (k) decided that h share which goes over on one child's death shall git the survivor for life only, and shall not go over a second time, the devise there was of several parcels of linds several children. Lastly, as there is no clause po viding for accumulation of rents, then if the children take vested interests they are entitled to the related their shares from the death of their father, the histel nant for life; and if any shall die under twenty dat

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⁽a) 4 Mad. 411,

⁽b) 5 Ves. 207; 1 Ves. jun. 562, Graves v. Bainbridge.

⁽c) Cro. Eliz. 352.

⁽d) 1 Bro. C. C. 91.

⁽e) 8 Ves. 10.

⁽f) 17 Ves. 479.

⁽g) Turner & Russ. 415.

⁽h) 2 Vern. 588.

their representatives will be entitled to the rents of their shares up to their deaths; Shepherd v. Ingram (a), Montganatic was Woodley (b). with the second on the second of the second short die mater (as my one in all also arain that age; -l'Chote appeared for the residuary devisees under R Bituals with but was not heard; as on the case sent to this bourt by the Wice-Chancellor it did not appear that they were parties to the exase. has a map birth our seem term liables out a type to average could enter the A. Prestok in reply ... The present case differs from these cited in this important particular, that the codiall here expressly: directs that the devisees shall not take ffi vested interests" till twenty-one; and as nothing shows the testator's intention to use the word is vested? in lany other | than lits | technical sense, it must be construck in that sense. Then unless the court stickes dut the words "unless" or "until," the estates are comtingental // These limitations are purely legal, subject to the rule of law, that a contingent remainder is destroyed by the determination of the particular estate before the contingency happens. But Montgomerie vi Woodisy was a case in which the legal estate being visited in trustees, a court of equity was called on to del with matters of purely equitable jurisdiction, viz. swings out of the rents and profits. In Edwards v. Hosmond the limitations were of copyhold; where this relication does not apply (c). The right to a vested estate cannot be possessed without the accompanying right to the rent and profits. If it is admitted that the devisees' right to them would be suspended till thining twenty-one, the consequence is, that the estate imit in gone by the failure of the particular estate

Aussei:

Buomanair
and Others

⁽s) Ambler, 448.

⁽b) 5 Ves. 522; and see Nicholls v. Osborne, 2 P. Wms. 419; Taylor v. Johann, id. 505.

⁽c) Bat see Watkins on Copyholds, vol. i. 192, 197, Vidal's edit.

RUSSEL 9.
BUCKAMAN and Others.

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Alexander

before it could vest; Leek v. Robinson (a), Judd v Judd (b). If real estate is limited; to A. for life, with an intervening chasm of a single day, a subsequent n mainder to B. for life is destroyed.

Gur, adan pult

The following certificate was afterwards sent:

This case has been argued before us by coursel to have considered it, and are of opinion:

In answer to the first question, That Robert Research took a fee in the property in question, and heir at law of the testator Robert Brown.

In answer to the second question, That the defeat

Ellen Russel, and Jane Russel, the infants, take not terest in the property in question, either under the mand codicil of Robert Brown, or as the haircages at a of Robert Brown or Robert Brown Russel.

In answer to the third question. That Firely Sheriff Russel, Robertson Buchanan, and Nathani Nicholls take a fee in the property in question, unit the will of Robert Brown Russel.

ants Frances Russel, Mary Russel, Elizabeth, Rus

J. VAUGHAR, W. BOLLAND, J. WILLIAM,

April 1834.

(a) 2 Merly, 863, 387.

(4) 3 Simetal's B. 198/ 16

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before a count with Lick v. Robinson of Indit v. diw old to the spinish to the life with an intervening chasin of a single day, a subsequent re-

DEBT on a judgment recovered in a county court. In an action The declaration stated, that the plaintiff on &c., in judgment of the county court of J. H. esq. and R. P. esq., sheriff of an inferior the county of Middlesex, holden &c. at the house claration is known acc. in and for the county of Middlesex, and bad on de-Within the jurisdiction of the said court, before the said does not consheriff and the suftwis of the same court; (and by the ment that the Methent of that court recovered against the said cause of action arose within the the said plaintiff were the jurisdicin the said court of the said sheriff before the said tion of the with and solitors then and there adjudged to the said it is not well for his damages which he had sus- enough to allege that the the brokested in the said court by the said plaintiff wered his damages within Tannet the defendant, by virtue of his majesty's writ of that jurisdicjudicies, to the sherff of the said county of Middlesex tion. whereof while defendant was convicted, as appears by the wir of disticles, and the proceedings had thereon he county court office of the said sheriff of Midweek now remaining, and otherwise will appear, and which said judgment now remains in full force and the stated that the plaintiff caused Program of execution to issue directed to the proper officer, who returned that the defendant had no goods de within his bailiwick, whereof he could levy the demages &c., and that the defendant had not yet paid de, whereby an action hath accrued &c. The declaration concluded thus: And the said plaintiff exhibits into court the said writ of justicies to the said sheriff of Middlesex directed, which gives sufficient evidence thereof, and avers that he is ready and willing to prove the said processes and proceedings of the said court of



404

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the sheriffust Middleses; held before the said sheriff and suitors of thet court, by which the said judgment manifestly appears to be in full force and effect and unsatisfied,—which witness the said debt in form aforesaid.

General demurrer and joinder, and the manner with the said demurrer and joinder, and the said manner with the said demurrer and joinder, and the said manner with the said and said.

Kelly in support of the demurrer. The declaration is bad for not showing that the cause of action in respect of which the damages were given accrued within the jurisdiction of the county court; for want of huris diction is always presumed against inferior courts. The allegation that the plaintiff in the court of the sheriff. and within the jurisdiction of that court, recovered his damages, only shows the court to be locally situated within the sheriff's jurisdiction. On demurrer to a derigration in debt upon a judgment of commissioners who had been made a court of record by a local statute (a). Willes C. J. stated the rule to be, "that nothing must he intended in favour of their jurisdiction, but that it must appear by what is set forth on the regord that they had such jurisdiction; Sollers v. Lawnence (b), Ladbrooke v. James (c). A party who pleads, a justification under process of an inferior court, must show, that the cause of action arose within the jurisdiction of that court, Evans v. Munkley (d), although one of its officers need not: Moravia v. Sloper (e), Herbert, v. Cook () Saffery v. Jones (a), Peacock v. Bell (h). Sq. where a judgment in an inferior court was pleaded, without stating that the consideration arose within the juindiction, a replication that the plaintiff and defendant

⁽a) 5 Geo. 2. c. 16., to determine disputes touching the rebuilding of houses in the town of Blandford which had been destroyed by a fire.

⁽b) Willes, 415.

⁽c) Ib. 199.

⁽d) 4 Taunt. 48.

⁽e) Willes, 30.

⁽f) Ib. 36.

⁽g) 2 B. & Ad. 598.

⁽h) 1 Wms. Saunders, 74, a. n. (1.) and cases there cited.

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rresided out of the jurisdiction, and that the bause terion arose out of it, was on demurrer held suffithe Briseve vi Stephens (a), and the cases there idered : Mico to Morris (b) Adney v. Vernon (e). an action in an inferior court the omission of an ment that the consideration of the promise arose in the jurisdiction, is error even after verdict; 539 V. Wall (d). to be more only be shown in a gibe of school for not thousand the large of author in

Milder for the plaintiff. Mr. Chitty, in his work on iding, lays it down, that even in pleading the judgit of an inferior court it is sufficient to state shortly Pthe plaintiff by judgment of the court recovered, ther it be a court of record or not; and it is not Essary to set out the cause of action, or that the Elidant became indebted within the jurisdiction of White: For this he cites 1 Saunders, 92., n. 2., where anthorities are collected. In an action for rescoing letter taken upon mesne process out of the palace Httithe want of an allegation that the cause of action ble within the jurisdiction is not sufficient ground to test the judgment; Bentley v. Donelly (e). So it is wight in a plea of justification under mesne process is defendant to state that the writ issued on an affi-Wilto hold to bail; and it is not necessary to state Bildause of action, because that is not traversable; Bolly. Broadbent (f). The court will now presume the cause of action arose within the jurisdiction. Rolland v. Veale (g) was a demurrer to a plea of jusmeation of an imprisonment under process from the Tremition court. Because the plea did not set forth the cause of action, Lord Mansfield said, "If it did

⁽a) 2 Bing. 213.

⁽b) 3 Lev. 23.

⁽e) Ib. 243. Roll. Ab. Escape, F. pl. 3.

⁽d) 1 T. R. 152.

⁽f) 3 T. R. 182.

⁽g) Cowp. 18.

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note the idefendant should have availed himself of the omission by pleas in the court below wib would have been a ground of defence there; but it is not to deserve: the plaintiff of his action here. ... If it was set alleged in the plaint below to be within the jurisdiction it would have been bad on error or writ of false judgment and we he might have taken advantage of it? (a)! [Lord Lynd] herst CaB. But Lord Mansfield goes; on to say this there "it is expressly set forth that the plaint was fortal cause of action satisfing within the jurisdiction of this court.ii. There are no such words here; the gavetental: that the plaintiff recovered his damages in the should's court, amounts to nothing. [Even if matter arises pages jurisdictionem, and plaintiff declarer infra infraidictionem, though the defendant may plead to the defendant diction of the court, if he waives that and pleads to the merits, he cannot take advantage of their want of jurisdi diction; for by the averment of the court; and his trace admission, he is estopped from saving that it was se matter that arose out of their jurisdiction & Leveling 4. Denning (b). Here, the jurisdiction of the coast for averred in every count in the declaration below! and the plaintiff need only aver that judgment was we covered on it; Bentley v. Donelly (c) [Bolland] Lord Kenyon's judgment in that case shows that the dril cision was on the ground of its being a motion in anut of judgment after verdict; as he says that the case in Salks. 201, would not alone have induced the court to come to that conclusion, but that Bull v. Steward (d) was direct authority. In that case the court resolved, "this being after verdict, we will suppose every thing proved at the trial which was necessary to be proved, and that the cause of action arose within the jurisdiction, unless the contrary be made to appear upon the face of this

⁽a) Cowp. 20.

⁽b) 1 Salk. 202.

⁽c) 8 T. R. 127.

⁽d) 1 Wils. 255.

RMAD'
POPM.

The of late years objections in point of form have Motoruled in order that the parties might come in sunhan the real medits. To take advantage of the being to state that the consideration arose within the miliction, the party should proceed by writ of argor to mara y. Thipe (a), Trevor v. Wall (b): [Bolland B. maching of debt brought by the defendant in an pior court upon a judgment of nonsuit, the declar on scontained the same averments as here; and: ough an objection was made that it did not allege hishe plaint was laid for a cause of action arising. his the inferior jurisdiction, the court held it to be grand both in form and substance, as the nonsuit blaid to be given and recorded at a court held within. matometr jurisdiction: Murray v. Wilean (e).]. So, monthie declaration in an inferior court stated that reation of action arose within the jurisdiction, and a Met passed for the plaintiff, the defendant below, in nation of treepass against the plaintiff for false imsentment, by arrenting him on that judgment, cannot has a justification under the process that the cause: action did not arise within the jurisdiction; Higson v. Martin (d). This case is confirmed by the down authority of Rowland v. Veale (e); and as here b plaintiff has acquiesced in the judgment of the! mt below the grounds of it cannot be inquired into demaster.

⁽d) 1 T. R. 151. (c) 1 Wile. 316.

(d) 2 Mod. 195, 4th point; S. C. 1 Freez. 322. where Scragge J. in parted to have held that the plaintiff was estopped from replying that it desired a judgment which was sell in being; and so long as that content in the plaintiff was sell in being; and so long as that content in the plaintiff of the plaintiff of the plaintiff.

⁽e) Cowp. 18.

to record mie coste er a nenemi, as mie himmi not be the less liable to be nonsuited bec cause of action arose within the jurisdicti judgment of nonsuit was said to have been court which had jurisdiction, and that is en it would have been if judgment had been for fendant, or of non pros on the plaintiff having [Lord Lyndhurst C. B. If an proceed. brought for a cause not arising within the jur but the plaintiff alleges it to be within it, and proof of that fact, he is nonsuited, and a judy nonsuit is entered, on which the defendant is to costs. If an action were brought by the d on the judgment for those costs, he could no cause of action arising within the jurisdiction c ferior court, but yet he would be entitled That case is an authority that the c not compel the defendant below to make an a which it is impossible that he can prove. It is to put the objection on a want of jurisdiction court below can give judgment for a defends ther it has jurisdiction over the cause of action [Lord Lyndhurst C. B. In the case of Bentle nelly (a), which was for the rescue of a debt on mesne process, the court held the avermen risdiction not to be necessary.] That, and of Inalian w Domming (1) which has also

1834.

a motion in arrest of judgment, not on demurrer; and the court refused to disturb the verdicts, on the principle of supposing every thing to have been proved that was necessary. [Bolland B. Lord Kenyon puts the judgment on the sufficiency of the declaration, saying, "that it is not necessary in such an action to state that the cause of action arose within the jurisdiction of the inferior Vaughan B. Luching v. Denning (a) one of the cases relied on by Lord Kenyon, does not apply, because it is decided expressly on the ground that where the plaintiff declares of a matter as arising infra juridictionem, which in fact does not so arise, and the defendant does not plead to the jurisdiction of the court, but waives it by pleading to the merits, he is estopped by the averment in the count and his own admission from saying that it was a matter sizing out of the jurisdiction (b). The reason of the decision of Lord Kenyon would be against the authority of all the cases and the known difference between cases after verdict and on demurrer. The case of denurrer to the declaration, where nothing has been proved in the court above, is yet an untouched question. Belk v. Broadbent (c) only determines that the original cause of action is not traversable where a superior court, and Rowland v. Veale, where an infaior court of competent authority has decided it;

⁽a) 1 Salk. 201.

⁽b) Nor does Bull v. Steward, 1 Wils. 255, the other case cited by Lord Kessan in Bentley v. Donelly, warrant the general proposition that it is not accessry in the declaration to aver that the original cause of action accrued within the jurisdiction; for there, in answer to the objection, that the allestion was only in general that the defendant below was indebted to the Paintiff, the court held, "that after verdict we will suppose every thing proved at the trial which was necessary to be proved, and that the cause the within the jurisdiction, unless the contrary could be made to appear apon the face of this record."

⁽c) 3T. R. 183, per Buller J. 185.

VOL. IV.

READ Pori. but not that the jurisdiction of the court may not, h traversed; and if it had decided otherwise, it would be contrary to the case of Tollers v. Lawrence (4) But Briscoe v. Stephens (b) is conclusive on the poin [Lord Lyndhurst C. B. Is there any case expressly (debt upon a judgment?] That which most negr resembles it is Richardson v. Barnard, in Relly Abridgment (c), which was an action in the King Bench for an escape from execution upon a ... ind ment in the court of Kingston-upon-Hull, in, 1 action on an obligation stated to have been made Halifax. It was not averred that Halifax was with the jurisdiction of the court, and the King's Bons after verdict, arrested the judgment on the ground, the insufficiency of the declaration. If, in an action is an escape, where the proceedings below are stated. way of inducement only, such an averment is required it is much more necessary here when the whole four tion of the action is the judgment in the court helps, As there is no direct instance of an action of debt. a judgment, the question turns upon the principles of law and the practice, and the best forms will have weight; as in the case of affidavits to hold to beil the established forms have been adhered to by the contin As to the practice, the form in use is in the min. Pitt v. Knight (d), which contains the very words. "At A cause of action arising within the jurisdiction of the court;" and the whole law as collected there shows the they are necessary. As to the principle, Sellett v Lawrence (e) shows that jurisdiction in an inferior count is never to be presumed.

Lord Lyndhurst C. B.—The subject of this genral demurrer is the want of an allegation, that the

⁽a) Willes, 413.

⁽b) 2 Bing. 213.

⁽c) tit. Escape, F. f.!

⁽d) 1 Saund. 92.

⁽e) Willes, 413.

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v.
Pope.

ause of action in the original suit arose within the trisdiction of the inferior court. The rule as laid own in Chitty on Pleading (a) does not prescribe such a averment; a passage in Serjt. Williams's notes to **"itt v. Knight** is there quoted(b), in which authority are, owever, found these material words, "that the plaintiff whed his plaint in a certain plea of &c., for a cause of Hiofi atising within the jurisdiction of the court." he words are marked in italics in the note in Sauners, are inserted in another passage of the text book noted (c), and form the foundation of Lord Mans-M's judgment in Rowland v. Veale. There, to an **Hoh!** for false imprisonment, it was objected that it wild appear on the plea what the cause of action as. of that the defendant became indebted within the bidiction: but as it was stated that the plaintiff below Which his plaint "for a cause of action arising within b jurisdiction of the court," it was held good. Hower, as there appears some difference of opinion on e point amongst the text writers, we will take time bok into the authorities.

On a subsequent day the lord chief baron said, that court had conferred with the other judges on the ject, who concurred with this court in opinion that objection to the declaration was valid, and the deter must be allowed. But they gave leave to the wiff to amend.

Vol. I.357. 3d ed.; 320. 4th ed. 1 Saund. 92, n. 2. 1 Chit. on Plead. 280, 281. 3d edit.; 250. 4th ed. 1**834**.i

Meditor. Buck to

The words " undertook and agreed to pay" in a quantum meruit count, do not necessarily import the form of action to be assumpsit, but are good in debt.

In an action of debt it is immaterial that the aggregate of the sums claimed in several the amount claimed in the queritur.

No objection on the ground of superfluity of counts, can be taken on demurrer, but it must be the subject of motion. (Reg. Gen. Hil. 4 W. 4. No. 6.)

ale busin de dictambe ellement a la menor po par arogning disarctican anotherally debigs off in AOV to mi butter Gardner and Another against Bowstania doing

had a reast to the plantiffs &c. EBT. The declaration was entitled 1 1834, and after reciting that the plaintiffs mand of the defendant the sum of 201.," stated in first count, that the defendant was indebted plaintiffs in the sum of 104 for work and labour surgeons and apothecaries, and for medicines to the wife of the defendant; concluding with ac crevit to the plaintiffs to demand and have 10 of the said sum above demanded. The second c stated, that in consideration that the plaintiffs at t special instance and request of the said defenden before that time done &c. other work &c., counts exceeds &c. for the said wife of the defendant, at, instance and request &c., he the said defendant took, and then and there agreed to pay the said tiffs as much money as they reasonably des have &c. Third count, that whereas the on &c, at &c,, was indebted to the plaintiffs for goods sold, and 10% for work, 10% for mo 10% for money paid, 10% for money on an account stated &c.: Whereby and by the non-payment thereof, an action hat said plaintiffs to demand and have of and said defendant the said several monies respective amounting to the sum of 201. &c. Demurrer ing for cause, that although the supposed action in the first and third counts are for debt in the action of debt, yet the supposed cause of in the second count is for the breach of a prop undertaking, and ought not to be joined with the posed causes of action in the first and third counts, as that it does not appear by the said declaration for the

use or causes of action the plaintiffs demand the m of 201. in the said declaration mentioned, or upon ich of the several sums of money therein mentioned e said action hath accrued to the plaintiffs &c. b " slitterle, els vels graces sets las labet

Mansel in support of the demurrer. The declara n is filed since the Reg. Gen. Trin. T. 1 Witt. 4., by e effect of which [Vol. I. 25.] the count on a quanmeruit is abrogated; for although no forms in the sion of debt are given, the rule says, "If any declaison in debt to be filed and delivered for similar pass of action (to those mentioned in the schedule of and directions annexed to the order,) and for ich the action of assumpsit would lie, shall exceed ch length, no costs of the excess shall be allowed to e plaintiff if he succeeds in such cause. And no design and unt on a quantum meruit is there set forth. Again, re is a misjoinder of counts; the action is brought in bt, but the quantum meruit count is in assumpsit; though the word "agreed" might support a count debt, as in the form in Chitty's Pleading, Vol. 2. (a), undertook imports a promise, and fixes the of action as assumpsit, Dalton v. Smith (b). Nor the cause of action set out with sufficient certainty, r the sum claimed in the writ should be the aggreate of all the sums stated to be due in all the counts.

Contyn for the plaintiff. The question of the inseron of the quantum merait count under the new rules oes not arise on demurrer, and the sum demanded in ebt is immaterial; M'Quillan v. Cox(c), Lord v. Touston (d). He was then stopped by the Court.

1884J GARDNER and Another

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i. Phipporteniti fing the i. (b) 2 Smith's Rep. 618. (6) 1 H. Bh. 249.

1884 GARDWER and Another ٠٧. BOWNAN.

Lord Lyndhurst C. B.—The argument for fendant is wrong, both according to the authoris the practice. The words "undertook and agree in all the common forms, and the case of N Bland (a) shows there is nothing in this ob There is no word of "promise" in the count ! in Dalton v. Smith, where it was averred, the defendant undertook, and then and there pres pay." As to the objection, that the aggregate sums claimed in each count amounts to more ti debt claimed, that is immaterial. The mome the court decided in M'Quillan v. Cox that the demanded in debt was immaterial, there was exthe question, and the sum stated in each a wholly immaterial. If the record had been int incumbered, the defendant might have moved out those counts; but he has demurred, and east no suggestion that he has merits, there must be

Judgment for the plan

i 318

(a) \$ Smith's Rep. 114.

Ashby against Goody and a midut

It is no ground for bringing up a prisoner by that the sheriff's warrant to the officer and gaoler,

LJUMEREY moved for a rule to state why a habeas corpus cum causa abouldum habeas corpus, to the gaoler of Northampton gaol, on the grou the sheriff's warrant to his bailiff and the directed the one to take and the other to details

under which he was arrested and detained, did not state the court out of which the w it not being shown that a copy of the process was not delivered to him at of executing it, pursuant to 2 W. 4. c. 39, s. 4, Smil i fendant till bail he put in, or a certain sum be deposited with the sheriff in lieu of bail, according to 7 & 8 Gize. 4. c. 71., in an action on promises; without stating out of what court the writ issued, so as to enable him to put in bail.

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ASHBY 9. GOODYNR.

Supplement, 374. the sheriff commands the bailiff to deliver to the defendant a copy of such process at the time of executing it. That is in pursuance of 8 W. 4.

2. 49. 2. 4, and would show the defendant the court cont. of which the writ issued. It is not suggested that by misadventure the copy of the writ was not delivered in this case to the defendant; but as it stands here, we must take it that when the warrant was executed the copy of the writ was delivered at the same time. Then how was it material to the defendant that the more warrant of the sheriff authorizing his officer to make the capture should state out of what court the writ issued?

Humfrey took nothing by his motion.

CHARLES LEONARD against WILSON, (one of the Public Officers of the Bank of Liverpool.)

ASCUMPSIT on a bill of exchange, by indozene A bill acceptagainst indozen. Plea: general issue (pleaded a London
bankers, in-

dasped in blank by the payer, was indorsed over by subsequent holders, who added dishift words, "In need Smith, Payne & Co." to their indorsement. It was aftermed it specially, "Pay Messrs. Terney and Farley or order." Terney and Farley indorsed in blank to plaintiff, writing thereon "Thomas Terney and Farley." It was afterwards indorsed in blank to several others, and when due was duly presented at the Landon bankers, at which it had been made payable. The answer was "no makers." On the same day it was presented, according to the previous memoratidum, to Smith, Payne & Co. London bankers, who refused to pay it, on the ground

LEONARD VILSON.

upon the first day of this term). The plaintiff defendant having agreed to make the facts of case, for the opinion of this court, under statute. W. 4. c. 42. s. 25. an order was made accordingly the following is the special case:

This action is brought by the plaintiff as ind of the bill of exchange described in the declar against the defendant, who is admitted to be a the public officers of the joint stock company to bank of Liverpool, appointed to be sued in resp the liabilities of that bank. The following is admit to be a copy of the bill, and the indorsements up

181. 5s. 0d.

Denton, May 6, 18

Three months after date pay to my order eig pounds five shillings for value received as advised Mr. Samuel Oldacre, Robert Mark

Hatter, Stourbridge.

3) J. H. 9 Aug.

(Accepted)

Payable at Messrs. Spooner, Attwoods & Co. Bankers, London.

Samuel Oldacre! .

ķ.

(Indorsed)

Pay to the Manchester and Liverpool District I ing Company or order, Robert Marlow—Pay James Ingham or order, For the Manchester and verpool District Banking Company, p pro. B. Tammanager for Ashton, Joseph Hudson. [In need S Payne & Co.]—James Ingham—William Kersh

of the mis-spelt indorsement of Terney and Farley. The case stated between the admitted the custom of London bankers to be to refuse payment of all bills, even accepted by themselves, if the indorsement be not correct to a letter. Dan at dishonour being given to the plaintiff, the bill was returned to him, and he game notice of dishonour to the Liverpool Bank, who subsequently pointed out the larity to the plaintiff. By their advice he sent the bill to Terney and Farley. They did so, and the sent up to Smith, Payme & Co. who refused payment as overdue:—Held of bill having been regularly presented and dishonoured, and due notice of dispersent to the Liverpool Bank, they were liable to pay the amount to the plaint

LEONARD V. WILSOM.

James Moor—John Syms—Patrick Leonard—p pro.
The Bank of Liverpool (a), Edw. W. Ward, submanager—Pay Messrs. Terney and Farley or order,
Chares Leonard (b)—[Terney and Farley (c)]—Thomas
Terney and Farelley—Henry Smith—Pay Messrs.
Ranson & Co.—Roberts & Co.—W. E. Hammond.

The Bank of Liverpool paid away the bill to the plaintiff, and indorsed it. The plaintiff paid and spetially indorsed it to Messrs. Terney and Farley, who are graziers in Ireland, and deal with the plaintiff. Turney and Farley paid it to Henry Smith, but indorsed it in this name Thomas Terney and Farelley.

On 9 August 1833, when the bill became due, it was presented for payment at Messra. Spooner, Attwood & Co. bankers, London, at whose bank it is accepted, payable. They refused to pay it, and gave for answer "No advice." It was noted on the same day, and on the following day, the 10th, it was presented at Messrs. Smith, Payne & Co. bankers, London, to whose house it was referred for payment, "in case of need," by the Manchester and Liverpool District Bank, one of the indorsers. Smith, Payne & Co. refused payment, on the ground solely of the irregularity of Birney and Farley's indorsement. The answer they gave was, "wants the indorsement of Terney and Forley." The custom of the London bankers is to tuine all bills, even their own acceptances, where there is an irregularity in an indorsement, even to the variation of a letter.

The bill thus dishonoured was returned, and notice im due course, through the latest indorsers, to Harry Smith, and by him to Terney and Farley, and

⁽a) Real defendants. (b) Real plaintiff.

⁽c) These varues were thus supplied in red ink on sending back the bill to L and F. See p. 418.

LEONARD U.
WILSON.

by them to the plaintiff, who resides at Liverpeol, and by him to the Bank of Liverpeol. On Tuesday meming, 20th August, plaintiff went to the bank, and saw Mr. Langton, who pointed out to him that the reason of the refusal by Smith, Payne & Co. was the irregularity in Terney and Farley's indorsement, and recommended him to send it back to Terney and Farley is get the mistake rectified, and advised him also to write to the acceptor. Plaintiff sent the bill back to Turney and Farley that same day, Tuesday 20th August. The bill was never passed through the books of the bank, who merely kept a memorandum of it, but of that fast the plaintiff was ignorant. The bank of Liverpeel id not give notice of dishonour to any prior indorser on the bill.

On Tuesday, 27th August, plaintiff brought back the bill to the bank of Liverpool, with the indersement of Terney and Farley supplied, as in brackets, in red ink, and requested them to send it up again, through the agents, Glyn & Co., to Smith, Payne & Co. They did so on the same day, and Smith & Co. on this sessed presentation refused to interfere, because the bill was now overdue. The plaintiff took up the bill, and requested payment from the bank of Liverpool, who refused payment under the circumstances stated. The question is, Whether the plaintiff is entitled to recover.

Tomlinson for the plaintiff. The plaintiff is entitled to recover. The bill being indorsed in blank by the Liverpool Bank, was presented by a bond fide helder for value at the house of Spooner and Attoood, where it was accepted payable (a). Payment was there to fused, not on account of the mis-spelt indorsement, but merely for want of advice. Notice of dishonour was

⁽a) Saunderson v. Judge, 2 H. Bla. 509; Treacher v. Hinnu, 4 E. Ald. 413.

LEONARD v. WILSON.

n duly given, and, as the plaintiff afterwards took the bill, his title is complete. The bona fide holder presented at Spooner's, was not bound to apply to yes and Smith (a) according to the suggestion on hill, "in case of need," but as he could make a d title through the indorsement by the Liverpool ik to himself, preceding that by Terney and Farley, was entitled to sue the Liverpool Bank notwithding the subsequent indersement by T and F. ch was objected to as incorrect. In Smith and was originally indorsed in and afterwards specially to one Jackson. He and with it without indorsing it, and it was objected t a subsequent holder for value could not recover, n against the acceptor, without such indorsement's : Lord Kenyon said, " The fair holder of a bill may mider himself as the indorser of the payer, and ike out all the other indorsements. This special inproment being made after the payee had indorsed, can-A affect the title of the present plaintiffs. The facts were more adverse to the plaintiff than the premt.:for an invegularity had accrued there between helder and the general indorser, whereas here it the place after the holder's title to sue was complete. ill the inegularity been, not that Jackson did not whose, but that he indorsed, adding his christian we or some matter making it a more specific indorsethan the description on the bill, it would have by elecely resembled this case. The mis-spelling ide me difference, for it is not surmised that the dememont was not to Terney and Farley, though they dered their firm with more particularity of spelling an those who indorsed to them. In Peacock v.

⁽a) Boon v. Russell, 4 M. & B. 365; Price v. Mitchell, 4 Campb. 200.

⁽⁸⁾ Penke's C. N. P. 225, and Sd ed. 295; Bayley on Bills, 4th ed. 101: 1 Esp. C. N. P. 179.

1834.

LEONARD
v.

WILSON.

Rhodes (a), a bill payable to order and indorsed in blank was stolen, and it was held that the plaintiff; who took it bona fide for valuable consideration, might recover against the drawer, as there was no difference between a note payable in blank, and one payable to bearer. [Lord Lyndhurst C. B. It was not necessary as between these parties that the bill should be presented to Payne and Smith at all. The bank of Liver pool are subsequent indorsees to the Manchester and Liverpool district bank. The latter are not the defendants in this case, so that the custom of the London bankers with reference to the act of Payne and Smith, who appear to have represented the district bank. does not affect the case as regards the plaintiff, but only applies to the presentment to Payne and Smith, with assign as a reason for their non-payment, that the bill, as then indorsed by Terney and Farley, did not duly authorize them to pay. Messrs. Spooner and Attacod, at whose bank the bill was made payable, made no objection to the mis-spelling, but refused to pay for want of effects.] The plaintiff's application to Page and Smith was merely in compliance with the suggestion on the bill, and in hopes that they would take it up for the district bank. Edie v. East India Company (b) is in point, to show that no custom can the e grani e egen a general rule of law.

Crompton for the defendant. The drawer and all the parties to this bill, except the acceptor, are discharged by the laches of the holder, in not presenting it at Spooner and Attwood's in a proper state. It may be conceded that after a general indorsement, a book

area of the state

⁽a) Dong. 611, 633. As to terms of restrictive acceptances, see Andrew. Bank of England, Dong. 637; Signurney v. Lloyd, 8 B. & Cr. 6 5. S. C. in error, 5 Bing. 525.

⁽b) W. Bla. 295; Burr. 1224, 1226, 1228.

Wilson.

i

le, holder may sue the acceptor on title derived from st, indorsement, notwithstanding any error in the termediate indorsements. But this plaintiff was in e, same situation as Terney and Farley, and if he a discharged, he paid them in his own wrong, by sich act he did not put himself in a different situam, from theirs; Turner, v. Leech (a). First, there was a dwe presentment, according to the usage of merpants, of the bill in a proper state, nor any default so to charge the drawer or indorsers. Torke was an action against an acceptor. The drawer nd indorsers are only collaterally liable as sureties to pay, the drawee does not pay after the bill has been preunted to him in that proper state in which he ought to ay it, and would be safe in so doing. Now this bill not presented in that proper state which the usage rish so much reason requires. This is a new case, in thich evidence of usage is admissible to prove the node, of presentment (b). So if the law be doubtful, supposing it to have been stolen, and the defendants have paid it, notwithstanding the irregular indorsement, that fact would have been evidence that they paid it without due caution. Though the refusal by Species was put on the ground of "no advice," that makes no difference, for the drawer and indorsers were entitled to have the bill presented in a proper state for payment.

Recordly, Termy and Farley, and persons in a similar situation with them, could not sue the drawer for a damage occasioned solely by their own negligence, or indexing contrary to mercantile usage, Easley v. Crock-

are an experienced to the second

⁷⁰d 5 (1/2 1) (1/2 4.5).
(a) 4 B. & Ald. 451.

Chitty on Bills, 142, 5th ed. citing Stone v. Resoltann, Willes, 561, Bong, 653 n. Custom as to presentment within banking hours, Parker v. Gordon, 7 East, 385; Elford v. Teed, 1 M. & S. 28.

LEONARD U. WILSON.

ford (a). For the contract resembles one of indeanity, in which the plaintiff's own default is an answer, that negligence occasioned the refusal to pay by the London agents of the Liverpool and Manchester dis trict bank. Thirdly, the plaintiff by sending the bit to Terney and Farley in Ireland, and afterwards cause ing it to be sent to London, without relying on in prior notice, occasioned a delay, which discharged the defendants and other prior indorsers, who were thereby prevented from giving notice in time to those who perceded them. The plaintiff in fact elected to abide by the effect of presenting the bill with an amended is dorsement to Smith, Payne & Co. [Lord Lyndhutt C. B. If the first notice to the defendants was regular, how could it be affected by what subsequently took place? Besides, Spooner and Attwood's objection to pay, was because they had no advice.]

Tomlinson in reply. Spooner & Co. would have been liable in damages, had they falsely answered "so advice," Marzetti v. Williams (b). The custom set up is inapplicable between these parties. It was by the defendant's advice that the bill was sent to Ireland.

LOTA LYNDHURST C. B.—The defendants are admitted to have had due notice of the dishonour of this bill. The presentment at Spooner & Co.'s, where the bill was made payable, was also regular. It does not appear to me that the instruction or direction to Smith, Payne & Co. by one of the indorsers, at all affects these parties; for the holder was not bound to present the bill at that house. The result of the fact is this: The bill being accepted payable at Spooner & Co.'s was duly presented there on the day it became

⁽a) 10 Bing. 244.

^{(5) 1} Bar. & Adol. 415.

LEONARD

V.
WILHOR.

yable. No objection was taken to the bill for any intality of indorsement, but payment was refused want of advice, which must be taken to mean want advise from the acceptor. It is clear that Terney I Flarley had good title to the bill, and that their specty in it passed by their indorsement, though sir mames were not spelt exactly right by the preindersets. Nor when the holder to whom the areas passed, presented the bill at the bankers at med house it was made payable by the acceptor, was shipeeted to on the ground of the mis-spelt indomethat, but solely on the want of advice. were aware that the firm consisted of persons and Torney and Furelly, and that the indorsement, it stood, passed the property. Ternsy and Fathe had a clear right to sue on the bill after payment ad been thus refused. Regular notice was given to ne plaintiff, and by him to the defendants, as previous safetistis; then the subsequent circumstances are immaerial. I am of opinion that there is no valid bar to he plaintiff's recovering on this bill.

VAUGHAN B.—The bill was indorsed by the proper parties, the presentment was regular, and due notice the given to the indorsers. Nothing done subsequently took away the effect of the presentment. The life spelling could not affect the party's right to recover.

j.

Bollmand B.—The objection is the want of due to the. Now, the plaintiff was clearly entitled to sue the the hill, and so were Terney and Farley. The other passed that property in it, by their indersement, though they spelt one of their names Farelly, it having them indersed over to them in the name of Farley. Then if the mistake is only in the way in which it was so indersed to them, no difficulty arises between these

1884. LEONARD 7. WILSON. parties. When presented at the acceptor's be the answer was "no advice;" but the alleged of dishonour is not material, notice of the dishaving been duly given to the parties immediate ceding, who might have in their turn given no the others. Then all has been done which the tiff was bound to do in order to recover. For the bill was afterwards presented at Smith, P Co.'s, and payment was refused on account of the spelling, the parties were not bound to present in The second notice of this refusal could not is the first.

WILLIAMS B.—I am of the same opinion. Thas been regularly presented for payment, an honoured, and notice of dishonour has been duly. The holder was not bound to present it at a Payme & Co.'s.

Judgment for plair

JANE COCHRAN, Administratrix of JAMES COCH deceased, against Fisher.

A ship's policy of assurance upon a policy of assurance upon contained a memorandum ship Cyclops, to recover the sum of 501., beit

in the margin, that the said ship was "warranted not to sail for British Nort rica after 15 August 1831." On that day she was in dock at Dublin ready and having cleared for Quebec, was hauled out of dock into the Lifey as the afternoon as the tide permitted. The wind blowing strong and directly river, she could not set a sail, but was warped down about half a mile, we tide falling she took the ground. The master knew at the time of leaving that the ship could not get to sea that day. She was warped a little furth day, took the ground again when the tide fell, being still ten miles from the bour's mouth. On the 17th, the wind having changed, she set her sails and got

bour's mouth. On the 17th, the wind having changed, she set her sails and got Held, that if at the time of breaking ground in the harbour, and going de river on the 15th, the captain acted bona fide, with intent to put himself in favourable position to proceed on his voyage, the warranty was satisfied, even

1834. Cochran

FISHER.

amount underwritten on the policy by the defendant. The cause was tried before Lord Chief Justice Denman. at the Lancaster summer assizes 1833, and a verdict given for the plaintiff, subject to the opinion of the court on the following case:—On the 26th February 1881, James Cochran (the plaintiff's deceased husbind) caused an insurance to be made on the ship Cyclops, of which he was master and part-owner. The policy of that date states that John Dixon, therein described as agent, as well in his own name so for and in the name and names of all and every other person or persons to whom the same did appertain in part or in all, did make assurance, and cause himself and them, and every of them, to be insured, lost or not lost, at and from and to any port or ports, place or places whatsoever and wheresoever, in any tade, for the space of twelve calendar months, commencing on 27th March 1831, and ending on 26th March 1832, both days inclusive, in port and at sea, at all times and in all places, and in all services, upon any kind of goods and merchandize, and also on the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture, of and in the good ship or rouel called the Cyclops, whereof was master for that present voyage James Cochran, or whomsoever else should go for master in the said ship, or by whatsoever other name or names the said ship, or the master threof, was or should be named or called, beginning the adventure upon the said goods or merchandize the loading thereof aboard the said ship, at as above, upon the said ship &c., and so should continue

had also intended to comply with its terms; but that if he so moved the ship not is order to get a better position, but with the sole object of keeping within the letter of the warranty, it had not been complied with. This alternative not having been the jury, a new trial was ordered.

COCHRAN V.
FISHER.

and endure during her abode there upon the said ship and further, until the said ship, with all her ordnane tackle, apparel, &c., and goods and merchandise who soever, should have arrived at as aforesaid, upon the an ship &c., and until she should have moored at anch twenty-four hours in good safety, and upon the gee and merchandize till the same should be there di charged and safely landed: and it should be lawful 4 the said ship &c. in that voyage to proceed and to, and touch and stay at any port or places whatseswa without prejudice to that insurance. The said ship &c., goods and merchandize &c., for so much as one cerned the assured by agreement between the assured and assurer in that policy, were and should be valued at 1800l. on acount of Captain James Cochran, and by a memorandum in the margin of the said policy the said ship was warranted not to sail for British North Ame rioa after 15th August 1831.

The Cyclops had arrived in Dublin harbour from Quebec in British North America, about 1 August 1891, and on 10 August was chartered on a voyage back Quebec. She was then lying in the custom-house deeli and great exertions were made by the master and entitle to get her ready for sea on 15th August, on account d the warranty. On the morning of the 15th she was cleared at the custom-house, and was then in all respects ready for sea. She was then at the custom house dock which opens into the river Liffey, which part of Dublin harbour, having on each side of it quest where goods are constantly landed and discharged, at half-past two in the afternoon of the 15th August which was as soon as the tide permitted, she hauled out of dock into the river, for the purpose of proceeding on her voyage to Quebec. The wind blew strong from E. S. E., which being right up the river sail was or could be hoisted, and it was manifestly

passible for her to get out of the harbour. She was warped down the river about half a mile, when the tide had ebbed so much that she could not get any further, and before low water went aground, as is unavoidable in the Liffey. On the following day when the tide served, the wind continuing foul, she was warped further down the river, when she again took the ground from the falling of the tide, at a place being still ten wiles from the harbour's mouth, and remained until the tide rose again on the next day, the 17th, the wind till blowing strong from E.S.E. and it being imposside to set or use the sails with any advantage, or to woesed to sea with the wind in that direction. Vessels want be warped below the Pigeon-house, which is thouseven miles from the mouth of the harbour. On the 17th the wind changed to N. N. W., when the ware immediately set, she proceeded to sea, and saired safely at Quebec. The master and crew fully is intended to sail for Quebec on the 15th August, if it had hea possible, and did all they could, using every mene and exertion to do so, and got the vessel out of with, and warped her down the river as far as the with of water enabled them, as before stated. # the time the vessel quitted the dock, they knew it

1894.
Cochran
v,
Fisher.

The vessel was lost on her homeward voyage from Quies in December 1831; and the question for the vision of the court was, whether the warranty not to will for British North America after 15th August 1831 led, under the above circumstances, been complied with? If the court should be of opinion that it had, the valiet for the plaintiff was to stand; if not, a nonsuit was to be entered.

impossible to get to sea that day.

Wightman for the plaintiff. The warranty was complied with by getting the ship quite ready for sea by 1834.
COCHRAN

the 15th of August, and on that day doing all possible to proceed on the voyage. [Lord 1 C. B. The case states every thing which is upon the plan. If the ship had been warpe extreme point to which she could be so me the Pigeon-house, she could not have sailed at that time, the wind being so directly adve distinction has been taken between a warrant and a warranty to depart. In Moir v. Royal Assurance Company (a), a ship warranted t from Memel on or before a certain day weighe but was beaten back and anchored again river's mouth. It was held, that the warrant complied with, and that it required departure port of Memel. Gibbs, C. J. saying, that had ranty been to sail, he should have been of a opinion. "To sail, is to sail on the voyage; 1 must be to depart from some particular place.' Lyndhurst C. B. This warranty is for comme voyage on or before 15th August.] The war ship down the Liffey is in effect the first ster mencing the voyage. [Lord Lyndhurst. Kno to be a useless step.] Not altogether; for a tance was accomplished; and no case has dec a ship must go a particular distance in order t with a warranty, if the master, after having the ship, bonâ fide takes every possible step: his voyage. That is the result of all the cases in Lang v. Anderdon (b). Though he may 1 attempt to be useless at the moment, he proce as he can in order to take advantage of a c wind. [Parke B. Where the time of clearing pulated to be deemed the time of sailing, " the ship was then ready for sea," and the sh

clearing, quitted her moorings and sailed, but something remained to be done, viz. taking in more ballast, that was held not a sailing, as she was not ready for sea, Pittegrew v Pringle (a). [Lord Lyndhurst C. B. Was this ship in a better situation for sailing after being warped half a mile than she was before? In Moir v. The Royal Exchange Assurance Co. the ship got under weigh, intending to proceed to England, the morning being calm, and proceeded till interrupted by adverse wind; whereas here, though the ship moved, the had no prospect of proceeding to sea.] She made all the progress she could on the 15th in the only practicable way, and gained a day on her voyage, by being warped as far as one tide permitted, and was so much nearer the harbour's mouth as to be ready to set and on a favourable opportunity. [Lord Lyndhurst C. B. By warping at successive tides the ship would have got to the Pigeon-house. There, as the passage wider, she would have had a more favourable position for tacking and getting out, if the wind should continue adverse. On the 15th and 16th the ship was in progress, by warping to a better place near the mouth of the harbour, which she would ultimately have obtained by that means, if the wind had not changed on the 17th, when she set her sails.] The question is, whether the moving on the 15th, found by the case to have been for the purpose of proceeding on her voyage to Quebec, did not take place with the bona fide intention of complying with the warranty by sailing on be voyage, the warranty not being to depart. The at of the ship being cleared, and in complete seagoing and sailing condition, distinguishes this case from Ridsdale v. Newnham (b), where, though the maser sailed on the proper day, he did not clear at the

COCHRAN T.
FISHER.

COCHRAN V.

custom-house on that day, so that he could not have proceeded on his voyage.

Cresswell for the defendant. The warranty was set complied with, and the acts of the master relied on for the plaintiff are merely in fraud of it. No sailing took place till the 17th, so that the winter risk was incurred, against which the warranty was directed. If the amount of distance for which the ship was moved was immeterial, the merely hauling her out of dock into the Liffey would have been a sailing and commencement of the voyage. The master, when he left the dock on the 15th, must have known it was impossible to proceed to sea on that day, and could not therefore have intended to do so. [Lord Lyndhurst C.B. At the moment he left the dock he could not have got to sea, but you cannot say he had not the intention to sail if the wind had shifted, as it might have done. According to the gument, bringing the ship out of dock and changing her place in the Liffey would be equally a sailing if she had been driven higher up. Setting a seil, or weighing an anchor in a harbour, is not sufficient, where it is known to be impossible to proceed to see. In all cases where mere moving in harbour has been held sufficient, there has been reasonable expectation of getting to sea, rebus existentibus. This being & warranty not to sail after a certain day, is like a warranty to depart, and is therefore within Moir v. Rowl Exchange Assurance Co., which decided that shifting & ship's place in harbour is no compliance with the latter warranty. [Alderson B. The words are not "not w sail from the harbour of Dublin after such a day." Not to sail is not to begin to sail. Lord Lyndhurst C. B. Had the ship been warped to the Pigeon-house, and the wind had all at once become favourable, she might have gone out at once; whereas had she stopped

COCERAN U. FREEZE.

her up, just before low tide, she would have been less favourable situation for getting out. Parke B. bably, under the circumstances of the weather, the p would never have been moved at all to the more posed situation she took up, except in order to satisfy terms of this warranty. We may infer that she would otherwise have been moved.] The ship was never net unmoored; for warping on an anchor is done by rying out a kedge and heaving to it by a windlass. that she is always at anchor; one anchor is always was before the other is taken up. If a ship gets her weigh in harbour with a present purpose to sail, t is a sailing so as to save a warranty to sail from a ce on a given day, Lang v. Anderdon (a), but merely ing an anchor in harbour is not. Can an attempt sail be equivalent to sailing? [Lord Lyndhurst. If e master lifts anchor knowing it to be impossible to steat of the harbour, how can there be a bonû fide tention to sail? In Nelson v. Salvador (b) the ship at some upper sails, weighed one anchor, and prowiled about thirty fathoms by heaving on the cable of wother anchor, when the master seeing a heavy swell ting in, deferred moving till next day: Lord Tenwhen held, that the warranty " to sail on or before a misular day," meant that the ship should be on her was on the given day, and that it was not fulfilled in ese, as she did not completely unmoor on the apwinted day, though she had her cargo and passengers beard, and was ready to sail. [Lord Lyndhurst. be never sails till the anchor is off the ground. Alder-B. In Nelson v. Salvador the second anchor was wer weighed at all, and was not placed there in order make progress by, as in the instance put of warping a kedge.] The warranty is absolute; had it been

⁽e) \$ B. & Cr. 495.

⁽b) Moody & Malkin, 309.

COCHRAN v.
FISHER.

meant to stipulate respecting prevention by bad we ther, the higher premium would have attached on t increased risk.

Wightman in reply. Whatever might be the exact ti of the ship's sailing in this case, still whether she subject to a warranty or not, she must at some time other have gone down the river in order to get to a The means of so going would be according to circu stances; by sailing, if feasible, and if not, by warni The fallacy of the defendant's argume lies in supposing it necessary that the ship should a away to sea, in order to satisfy the warranty. Se posing that in order to save the warranty she: moved into the river at an earlier period than she won otherwise have been, that is no more a fraud on the underwriters than any other previous step taken provision and load her with all expedition in ord to get her ready for sea in the time specified. Nelson v. Salvador the ship never moved from h moorings, whereas the changing her place in the six might enable her, by gaining a distance there, to tal advantage of any short period of lull or favoural wind in order to get out, which she could not he done had she remained higher up. [Lord Lyndles C. B. The captain must have known that from the d ration of the tide he could not by the slow process warping proceed further on the 15th than a quarter a mile.] He might know that he could not get a that day, but if he took the only mode of beginning d voyage by going as far as he could, then if he bona fi intended to go to sea that was sufficient. The wish to get to sea, under the circumstances me have proceeded from the warranty.

Lord Lyndhurst C. B .- By the terms of the wi

muty the ship was warranted "not to sail for British North America after the 15th of August 1881." broke ground in Dublin harbour on the 15th of August, and was warped down the river Liffey a quarter of a mile, till it was found impossible to go further, on account of the fall of the tide. On the next day she was warped down further, as long as the continuance of the tide permitted. The question turns entirely on the intention of the captain; if at the time of breaking ground and moving the vessel he proceeded down the tiver with a bona fide intention of placing her in a more favourable position from which to prosecute the wyage, that would be a compliance with the warranty; but if, as there is some reason to apprehend, he left the dock and warped his vessel down to the place at which the took the ground, with no other object than merely and solely to comply with the letter of the warranty, that would not be such a sufficient commencement of the voyage as would be a compliance with the warmity. This alternative was a question of fact for the conideration of the jury; but as the facts were not ted to them, no conclusion of fact has been drawn, that we are not in a situation to decide the question. The case should be sent to a new trial to furnish materials for our judgment. The question will be, Whether the note, on the 15th of August, by hauling out of dock warping down the river, intended to place himself hamore favourable situation for prosecuting his voyage, recely and solely to comply with the terms of the remarky? If what the captain did was with an intenof placing the vessel in a more favourable situation rocceding, as well as to comply with the warranty, think that the warranty was complied with.

PARKE B .- All was found by the jury which could

1834. Cochran v. Fisher.

1834. Cochran ø. FISHER.

be found under the circumstances, but that i enough. It must be ascertained whether the n on the 15th was merely and solely for the pr of bringing the case within the letter of the warr

ALDERSON B.—If the vessel was warped down 15th merely and solely for the purpose of bring within the warranty, that is not enough; but if wh captain did was from a mixed motive, partly t himself in a more favourable position to commen voyage, and partly to comply with the warranty,: sufficient.

Rule absolute for a new trial

(a) The case having been tried again before Gurney B. the plain a verdict, with a special finding of all the facts. A writ of error havi afterwards brought, the Court of Exchequer Chamber gave judgmes favour in Hilary vacation 1835. See Vol. V.

WRIGHT and Another, Assignees of JACKSON a rupt, against Sorsby, executor of Sorsby.

During a trial a plaintiff's counsel proposed to the defendant's counsel that sent to a verdict for 100l., without costs on either side. The defendant's counsel conferred with

THIS was an action for money paid to the use testator, which came on for trial before Mr. J. Taunton at the last summer assizes for Yorkskin last cause but one on the second list of causes, vi he should con- the West Riding. A verdict was taken for the tiffs by consent for 100l. without costs.

> Addison had obtained a rule to show cause wh payment of costs, the verdict should not be set

defendant and his attorney, who were in court, advising them to accept the but both told him it could not be agreed to. However, the defendants of took on himself to consent to a verdict on the terms proposed, and it was a accordingly. Held, that as neither the attorney nor the defendant opposed the the order at the time, except in private conference with their own counsel, trial could be granted, even on payment of costs, and a rule obtained for that a was discharged with costs.

and a new trial had, with a stay of proceedings in the meantime, upon an affidavit of the defendant's attorney, who stated that his special pleader had advised there and Another a good defence to the action. That on the cause coming on, his counsel told him that the plaintiffs' counsel had proposed to take a verdict for 100l. on behalf of his client, each party paying his own costs; to which course the defendant's counsel recommended the defendant's attorney, to accede. The affidavit went on to state, that deponent informed his said counsel be should not accede to such proposal, and wished the stage to proceed. Shortly after, while the plaintiffs' was stating plaintiffs' case, the defendant's counsel again urged the deponent to accept the plainoffer, but deponent, after consulting his client the defendant, who was seated near him, informed his said commel that he could not accede to the terms proposed. That his said counsel then addressed himself to the fendant, and advised him to agree to the terms of thement proposed by the plaintiffs' counsel, but the Sendant stated that he could not agree to them, as he be paying more money than he had received. the defendant's said counsel then observed, "I take it on myself," or words to that effect, and ming round, informed the plaintiffs' counsel that his poposal was agreed to by the defendant. A verdict consent for 100% without costs was then taken, and eponent saith that it was so taken without consent, contrary to the express wishes of the deponent the said defendant, as mentioned to his said Seemel. He also produced an affidavit of merits, and Contended that it was positively sworn that the acquiescence of counsel took place without the consent of the parties.

Atcherley Serjt. now showed cause on an affidavit of

1834. WRIGHT SORSBY. WRIGHT and Another Sorsby,

the plaintiffs' attorney, which stated that while tl plaintiffs' counsel was opening the plaintiffs' case the jury, the counsel for the defendant interposed wi an offer of a verdict for 60l. without costs. offer was declined and the speech proceeded, duri which a conference took place between the defenda his counsel and attorney, which ultimately terminat in the address for the plaintiffs being again interrupt by a proposal from the defendant's counsel to perm the plaintiffs to take a verdict by consent for 100% wit out costs; which terms the plaintiffs' attorney consent to accept, and a verdict was accordingly taken for t plaintiffs. The learned serjeant cited Mole v. Smith (where Lord Chancellor Eldon said, "It is for Mr. Sha well to consider whether he is authorized to give hi consent for the widow. If he does, I must act upon in and she will be bound by it." In Furnival v. Bow and others (b), Lord Chancellor Lyndhurst decided the a party is bound by the consent of his counsel given is court, though they had no instructions to consent, i they were at the time apprised of all those facts C which the knowledge was essential to the proper ex ercise of their discretion; but that he will be relievefrom an order made by such consent, if, when hi counsel exercised their discretion, they had not thos materials before them on which a correct judgmen might be formed. There, the solicitor being absen and only his clerk present, the terms offered were only accepted on the counsel who proposed them declarin that if they were not accepted he must forthwit proceed adversely (c). The present case is stronge

⁽a) 1 Jac. & W. 673. See Thomas v. Hewes, ante.

⁽b) 4 Russ. 142.

⁽c) That case leaves it doubtful how far a party will be affected by remissness of his solicitor in not immediately objecting to an order made consent of counsel in court, when neither the solicitor nor the suitor we present, and neither had given instructions to consent.

or the defendant was present at the time of the negoiation and when the verdict was taken. He also cited Filmer v. Delber (a). The court then called on WRIGHT and Another v.
Sorsby.

Addison to support his rule. In the cases cited it was left in the discretion of counsel to consent, if they hought it advisable. Here that discretion was excluded by the express protest made on the spot by the attorney and the party himself. The counsel took it in himself to consent to the verdict.

Lord LYNDHURST C. B.—I always thought that a party was bound by the act of his counsel under such circumstances as the present, and decided accordingly in the case brought before me on the other side the hall. In the present case the refusal of the defendant's attorney and his client to consent to their counsel's advice, took place in a private conference among them, and was not communicated to the plaintiffs. If it had, the plaintiffs' counsel might have gone on to obtain a verdict, which would have burdened the defendant with costs. On the contrary, the defendant allowed the verdict to be taken by consent in the terms proposed. and though it may be true that he remonstrated with his own advisers, it would be to the prejudice of the plaintiffs if the terms on which they then consented to a verdict without costs were not now enforced.

PARKE B.—It would have been better that the defendant and his attorney should have opposed their counsel at the time than that it should be done now.

The other barons concurring,

Rule discharged with costs.

(a) 3 Taunt. 486.

18.34.

EDWARDS against EDWARDS Administratrix with the will annexed of HENRY EDWARDS deceased.

The expenses which execurors will be justified in incurring about the funeral of the deceased when his estate turns out insolvent, must be reasonable, according to the circumstances of each particular case, with reference to the testator's condition in life.

action against the personal representative of the volunan annuity plene administravit was pleaded, the defendant claimed an expenditure of 1037, on the funeral of the deceased, who died worth 2987/., but whose rank in life did not appear.

Semble, that that sum could not be

allowed to the personal representative on plene administravit, against a claim for m arrear on the annuity deed.

DEBT on a covenant in an annuity deed, by which the deceased, H. Educards, covenanted for imself &c., in consideration of natural lave and affecting to pay the plaintiff (his mother) an annuity of 324 per Breach, that 26L, one half-year's ansain, was in arrear and unpaid. Plea, plene administravit Replication, that the defendant had assets of the deceased unadministered in her hands at the time d bringing the action. Issue thereon. The cause tried before Bosanquet J. at the last summer assists for Curmurthenshire. The defendant was the wine of the deceased, and representative as well of his real Where in an as his personal estate. She admitted assets to the amount of 2987L, but set up various payments to a larger amount as made in her character of adminitary grantor of tratrix. The following payments were disputed: 10% for funeral expenses and mourning; money paid in dicharge of two mortgages, one granted by the deceased and the other by his father in 1783, before the deceased had possession; an arrear of interest on the old mortgage paid off by the defendant; and lastly, the costs of reconveyances of the mortgaged property to her, and of several ejectments brought to recover the possession.

> The learned judge directed a verdict to be found for the plaintiff for 261., with liberty to the defendant to

Nor can items for expenses of reconveying mortgaged premises to the real representative of the mortgagor, and for costs of ejectments brought to recover them, be so allowed. Nor a payment by the personal representative out of the assets on account of interest due on a mortgage created by the father of the deceased before the estate descended to the latter.

to enter a nonsuit, or reduce the verdict by enting any items the court should disallow, the to be at liberty to exercise the same judgment on facts as a jury might have done. A rule having accordingly obtained in *Michaelmas* term,

EDWARDS P. EDWARDS.

V. Williams showed cause. The item of 1031, for ral expenses cannot be allowed to this administratrix; he rule is, that where the estate is solvent, only a prable sum should be expended, and no more than when it is insolvent; Hancock v. Podmore (a). , v. Punter (b) Lord Hardwicke says, "At law re a person dies insolvent, the rule is, that no more l be allowed for a funeral than is necessary; at : 40e., then 5l. (c), and at last 10l., and the law has been since altered. It must be confessed that he says, "he thought it a hard rule, as an executor is red to bury his testator before he can possibly w whether his assets are sufficient to pay his debts:" adds, "that a court of equity was not bound by strict rule: and that where the testator leaves large s in legacies, that is a reasonable ground for the rator to believe that the estate is solvent, and that ach a case a court of equity would not adhere to rule of law." The latter rule must however apply w in all cases, and this court cannot inquire whethe executor, at the time of the funeral, had reaable ground to suppose the estate to be solvent. next items claimed are for payments in redemption two mortgages on the real estate of the deceased, I for reconveying it to the administratrix as the real wesentative, and for the costs of three ejectments ought by her in the name of the mortgagees to

⁽a) 1 B. & Adol. 260.

⁽b) 3 Atk. 119.

⁽c) See Smith v. Davies, Bull's N. P. 143.

EDWARDS 2.

recover the possession. Now on plene administra executor can only receive allowance for the payers debts of higher degree than that claimed by the tiffi or of equal degree with it but haid before brought by the plaintiff. The expenses of recov and reconveying the mortgaged property fall w neither of those descriptions. The executor is it to satisfy a bond held by a mortgagee as a colli security for the payment of the mortgage money, b paying simple contract debts; but as far as this in concerned, his duty stops there for the time." SI indeed the estate arrive at a surplus, the represent of the real estate can compel the representative of personal 'estate' to exonerate the real 'estate' from consequences of the mortgage, (viz. the costs' & conveyance, and paying costs of ejectment to lec possession.) as well as from the "debt itself." Ba surplus can be declared till every claim against deceased is satisfied. Now as this claim of the plan though being on a voluntary deed, must be post; to every simple contract debt of the deceased. A bound the deceased in his lifetime, and his attin trattix after his death; Cray v. Rooke (a), Leth v. Cartisle (b), Lady Cox's case (c). Had the test lived, the reconveyance might have been insisted to him. It is now attempted to enforce it against his sonal estate; but the administratrix, before she sums which could only be claimed through the deces was bound to pay all that could have been enfor against him. On that principle the item for intere the old mortgage of 1783, made by the father of deceased before the latter came into possession. be disallowed as a mere voluntary payment.

[&]quot;Chilson and J. Evans supported the rule." A common distinction of the rule." A cases temp. Talbot, 153. (b) 3P. Wms. 222. (c) Id.,

questions as to the funeral expenses are, whether they were or were not bona fide incurred by the administratrix, and whether she was not reasonably justified in incuring them by the apparently solvent circumstances of the deceased at the time of his death. cock v. Podmore does not lay down as a general rule that in the case of an insolvent estate, 201, is the utmost mum to be allowed for funeral expenses, but proceeds on its own particular circumstances, among which one strongly urged, viz. that the executor must have mown the estate to be insolvent. In Stag v. Punter Lord Hardwicke clearly recognizes the question in equity to be whether the expenditure was such as a custions and prudent person would incur under the drcumstances of apparent solvency in the particular ese; 601. was there allowed. As to the expenses of he reconveyance, the administratrix would not be metified in paying the mortgage money without taking legal acquittance, so as to secure her against repaying is and the expense of a release is about the same with that of a reconveyance. It was the defendant's duty to recover possession of the mortgaged premises, so that the costs of the ejectment should be allowed. The item paid for interest of the old mortgage debt is daimed from the administratrix as personal repretative of the deceased, who would have been liable executor of his father.

Cur. adv. vult.

The judgment of the court was now delivered by

PARKE B.—It appears to me that this rule ought to be discharged, as in any view of the case there will be surplus sum, to the allowance of which the administratrix will not be entitled, and which will therefore be applicable to the payment of the plaintiff's annuity.

EDWARDS

EDWARDS

EDWARDS.

As to the expenses of the funeral, the law is laid down to be, that only a reasonable sum can be allowed to an executor in the case of an insolvent estate. In Shelly's case (a), which occurred previously to those which have been cited, Lord Holt said, "that in strictness no funeral expenses are allowable against a creditor except for the coffin, ringing the bell, person, clerk, and bearers &c., but not for pall or ornaments." In Stagg v. Punter (b), Lord Hardwicke stated, that "at law where a person dies insolvent, the rule is, that so more shall be allowed for a funeralthan is necessary, at first only 40s., then 5l., then 10l." But in the later case of Hancock v. Podmore (c) as much as 201. was allowed. The court there did not lay it down as a rale that even that sum should be the limit of the allowance where the estate was insolvent, but that it was the proper limit under the circumstances of that case. The duty of an executor is to incur such reasonable penses only as are suitable to his testator's condition is life; if he goes beyond that limit, he must take his chance of losing his reimbursement, should the estate prowe insufficient to satisfy the creditors. In this particular case the court does not mean to lay down that SOL only would be allowed for funeral expenses : for the sum to be so allowed may be more or less, according to what was strictly necessary under the circumstances. though 1031. seems too much.

However it is unnecessary to decide this point, for whether we should allow 201., 301., 401. or 501. for that item, there would still be a surplus in this case for other items which cannot be allowed to the administratrix, and which are more than sufficient in amount to satisfy the plaintiff's claim, and entitle him to retain a verdict for \$61.

⁽a) 1 Salk. 296. See Greenside v. Bonson, 3 Atk. 249.

⁽b) 3 Atk. 119. (c) 1 B. & Asiol. 260.

The next items claimed by the administratrix to be allowed in her accounts against the creditors, are payments by her for the costs of reconveyances and of ejectments brought to recover possession of the mortgrand property. I am of opinion that these payments must be disallowed, and that an executor is not entitled seekon them as payments valid against the creditors of his testator, though he might do so against the heir residuary legatee, if made out of the surplus, should ultimately exist after satisfying all outstanding demands against the deceased. These are not pay-**Dents to the creditors of the estate; they have a** right to have disposition made by the executor of the **Personal** estate as against the real representatives, the better having only an equity to have the real estate experated of that mortgage out of any surplus perwhich might remain after paying all the tesbefore that debts. But while any outstanding debts or engagements exist, the executor is not bound in equity we pay over the apparent surplus in exoneration of the estate, till some provision is made for liquidating these debts at a future period; e. g. in this instance by ting apart a sum sufficient to satisfy the growing Psyments of the annuity. If no real surplus of perwhile should ultimately exist, the real representative could not claim exoneration of the real estate. The next item claimed was a payment out of the testator's For interest due from his father on the old mortsige; but inasmuch as it is not proved that any of the ther's assets came to the deceased, but, on the con-Tury, it appears that all the assets were proved to belong the deceased himself, that payment cannot be allowed; for the executor can only claim an allowance for paying the debts of the deceased. As it turns out that, without taking into account the sum claimed for funeral expenses, the amount of the items disallowed is

EDWARDS v.
EDWARDS.

cutors must be governed in every case of the Hancock v. Podmore lays down no rule, and is sistent with the earlier cases which fix particul. It is clear that even the larger sums allowed are too low for modern exigencies in many at life: but we are not here called on to fix the prof allowance to personal representatives.

ALDERSON B.—It is not necessary in this say whether 201. is a sufficient and reasonable be allowed to the executors for funeral expense instance of an insolvent estate. The sum to be in each case should be that which was strictly m for the particular funeral; a sum which must every instance according to the particular localit it takes place, and the price of the requisite, there at that time. I concur with my brothe on the other points.

Rule discha

Soe Bissett v. Antrobus, 4 Slm. R. 519.

THE FOURTH YEAR OF WILLIAM IV.

deceased, against OSBOURN.

Spote man tent i to nd Another, Executors of the will of Wilson

منوران فيعتري والهراجان أأجري والمتا

as an action of debt brought by the plaintiffs The contract of an attorney e executor and executrix of one Thomas or solicitor receased, to recover the sum of 154l. 17s. 6d., tained to conduct or dent of the testator's bill for business done fend a suit is or the defendant as his attorney. The de-tinuing, viz. to pleaded the general issue and the statute carry it on till its terminaions; on which pleas issues were joined. its terminaiculars of the plaintiffs demand (consisting only be determined by orney's bill) had been delivered to the de-the attorney inder a judge's order, and by agreement upon reasonhe parties formed part of the case to be So that in an by either party. Under the power given by action by an attorney for Will. 4. c. 42. s. 25., the plaintiffs and business done in a suit more than six years n of the court:—The business charged for before the commenceticulars of the plaintiffs' demand was done ment of the tator for the defendant according to the dates action, the statute of limiirticulars, and the disbursements of money tations 21 or in the same particulars were made by the 3.3 is no bar or the defendant as set forth in the particulars. when no such in the said bill of particulars are for charges given, and the of one and the same cause, which, during all suit did not therein mentioned, was in progress in the within six herein specified. The defendant has paid years before in this action a sufficient sum to cover all brought. of the plaintiffs' demand which was contracted years before the commencement of this ac-

able notice. the action was

estion for the opinion of the court is, whether te of limitations which the defendant has e a sufficient bar to the plaintiffs' recovery of ie of their demand or not? If it be, judgment

HARRIS and Another v. OSBOURN.

is to be entered for the defendant on a nolle prosequi; if it be not, judgment is to be entered for the plaintills by confession for such sum as any two clerks in court in Chancery, one of them to be selected by each party, shall, upon taxation, find to be due to the plaintill in respect to the before-mentioned bill of costs and pre-ticulars.

The question is R. V. Richards for the plaintiffs. whether, when debts are incurred to a solicitor in the progress of a suit from the client who retained him, the former must sue at each step, or commence an action for his bill just before the expiration of six years; or whether he may, at the final termination of the wit, recover the total amount of his bill, though some of the items were incurred above six years before. mitted, that not only is a professional man not so bound, but that he is not entitled to sue for his charges before the expiration of the suit, unless he has withdrawn Late decisions have services on reasonable notice. established, that if he is not furnished by his client with necessary funds he may abandon the cause, and alterwards recover for his services during the period be was employed; Vansandau v. Browne (a), Rowset v. Earle (b), though formerly it was held otherwise, Mordecai v. Solomon (c). But he must give timely reasonable notice to his client of his intention to withdraw on that account before he can so sue. for the contract between them could not otherwise be determined, it being in its nature entire, and continuing due notice given by either party. Thus in Holy v. Built (d), where on the day but one before an asset,

e strater

⁽a) 9 Bing. 402.

⁽b) 1 Moody & M. 538.

⁽c) Sayer's R. 172. See per Lord Eldon in Cresswell v. Byron, 14 Ve. 272. And see 1 Sid. 31.

⁽d) 3 B. & Adol. 330.

or which notice of trial was given, the attorney abanioned the cause without giving his client previous potice of his intention, it was held that the client was entitled to recover against the attorney for damages to which he had been subjected by his default to act on is retainer, by instructing counsel to defend the cause. The contract of the attorney with his client for conlucting a suit, nearly resembled one for building a hip or a house &c., for which no action lies before its completion, till it was held that an attorney, on due otice given, might rescind it for want of funds furished him by his client. But it would be highly mishievous to hold that without waiting for some termiution of the cause, he might sue for every act done by in the course of it. [Lord Lyndhurst C. B. While sat in the court of Chancery I heard a motion in a mit commenced in the time of Lord Hardwicke, and shigh was above a century old. How could it be expected that any solicitor or succession of solicitors pald carry on a suit of such duration without receiving dvances from the various suitors to cover the necessary lisbursements?]

HABRIS and Another v. Osbourn.

Kelly for the defendant. The contract of an attorney solicitor is not in its nature single and indivisible for arrying on the suit to its termination, but is an underaking to perform certain professional services while he emains such attorney or solicitor. The right to sue them accrues from time to time as they are executed. Lord Lyndhurst C. B. Did you ever know an instance as action brought by an attorney for his services in a pause, while it was still pending and conducted by him as the attorney? No case expressly decides that such an action would not lie; and Vansandau v. Browne shows that an attorney may recover his costs before the suit is terminated on giving reasonable notice of abandoning it.

HARRIS and Another v.
OSBOURN.

In that case Tindal C. J. reviews the cases which have been cited, and thus notices the objection that an attorney cannot sue for his bill till the business which he has been retained in is terminated: "It would be long before I should be induced to assent to such a propo-Suppose the employer to become insolvent sition. while the attorney is engaged in a long and difficult suit, it would be hard if he could not recede-reside-from such an engagement." The chief justice, in considering Lord Eldon's judgment in Cresswell v. Byron (a), with cides with the opinion intimated by that learned person, that an attorney cannot retain his lien on a client's papers after he has ceased to conduct the cause whis right to sue for past services, after notice given, stands on a widely different footing. The sudden abandon ment of a cause by an attorney is a good defence to an action by him for his previous services, not because the contract is a continuing one to carry the cause through to a termination, but because on such abandonment him services become of no value. Even if reasonable metic is necessary to the maintaining an action, it is net passes of the cause or right of action. That remains not with standing such notice is not given; for the neglect-tame deliver a signed bill, as directed by 2 Geo. 2 p. 28 time the six years were nearly expired, would not preventage the attorney from commencing an action so as to present vent the operation of the statute of limitations. authority can be cited to show that the contract to implied from these circumstances is entire till the tax is determined. It is said that it is only defeasiballing where the client does not supply the requisite fundament but it must also cease at the death of the attorney asset his representatives must then be entitled to secover person rata for his past services. The inconvenience of loss

(a) 14 Ves. 27.1. September 140 Olders

rectipits, against which the statute was intended to

HARRIS Wild Another T. OSBOURN.

guand, will arise where payments take place on account in the course of suits which last many years. (160 s 2010) has been council in a terminated at the world be long -og Richards in reply: The decision in Hoby w. Built sould not have taken place thad it not been considered that the attendey's contract, instead of being divisible at the itakiling each step is: continuing and binds him to minutes the business, unless determined by reasonable Lord Elder and meat in Cosmid v. Hyron (reside rates with the opinion intinared by that learned person. * : Lord Lun Dauksr C. B --- Were we to nevede to the ingument for the defendant, one consequence would be, that plients would be obliged to pay off their attoriby's hillboat particular periods instead of being able to matisfy, them by making advances out account. "But'I odazider that when an attorney is retained to prosecute defend-a cause, a retainer is implied for the whole minter and a special contract arises to carry it by to its maination of That contract dannot be but an end to puithout reasonable notice !!!! It is undecessary here to dicide what notice would have been required in first series mone of any kind appears to have been given: itherefore consider the contract to have been their ming; and be have remained entire, so that the state of limitations does not apply in bar of the consumitated to at the other contacts of the montacts of the best the abolice as well all the contract to bein Parital B. 44 I am of the same opinion. I have enterfind considerable doubt on this question during the chgriss of the argument; but on consideration I think the decisions on the subject may be explained on or other of the two following grounds either on supposition that the attorney's contrast is special to carry the suit through to its termination, but de-

Tessible on notice, or that it is a general contract, and

1834. HARRIS and Another **11**. OSBOURN.

to be treated as such. My doubts were, under which of these descriptions the present case must be classed; but I now acquiesce in the doctrine that this was an entire contract to carry on the suit to an end, though defeasible as above stated. It was anciently held to be an entire contract of which the attorney could not by any means divest himself; but the greater length of suits in modern times, with their very increased expenses, have occasioned the decisions that the attorney may determine such a contract on reasonable notice given. I am therefore of opinion, that as no such notice was here given, the contract continued entire. Then the statute of limitations does not operate as a bar. None of the cases are irreconcileable with that doctrine, and I acquiesce in the opinion of my brothers.

BOLLAND and ALDERSON Bs. concurred.

Judgment for the plaintiff.

DICKENSON against TEAGUE.

A plea of the statute of limitations stated that the cause of action did not nccrue within six years next mencement of the suit. Plaintiff replied,

A SSUMPSIT by indorsec against the payee and indorser of a bill dated 20th March 1826, payable two months after date, viz. on 23d May 1826. Other counts treated the instrument as a promissory note drawn by an agent of the Devon and Cornwall mining before the com- company on that company, and accepted for them by W. another agent of the company. Pleas: non #

that the cause of action did accrue within the six years, &c.:-Held, that without specially replying process issued, the plaintiff might on the above replication process quo minus to have issued within the six years, and produce the roll to show the continuances regularly entered up accordingly.

It continuances are regularly entered upon the roll, the court will not look at #1 thing in order to contradict the roll, e.g. a writ produced to show that a second will an alias, was tested on a day subsequent to the return day of the first.

The cases enumerated by 3 & 4 Ann. c. 9. s. 1. in which promissory notes again by an agent cannot be assigned, are instances only.

DICEERSON v.
TEAGUE.

npsit; and secondly, that the causes of action did secrue within six years next before the commenceit of the suit. Replication to that plea, that the mes of action did accrue within six years next before : commencement of the suit. At the trial before Mand B. at the London sittings after last Michaelmas m, the four following writs were produced, and wed to have issued. First, a writ of quo minus, ted 21st May 1832, issued within six years from the when the cause of action accrued, returnable on th May, the first day of Trinity term. The second it was an alias quo minus tested the last day of the ne term, viz. 16th June 1832, returnable on the first y of the then next Michaelmas term. The third it was tested the first day of Michaelmas term, rernable the first day of the next Hilary term. The arth was tested on the last-named day, and returnable st January 1832, and to that the defendant appeared. be plaintiff also produced the roll on which connuances had been regularly entered up down to the fendant's appearance. The declaration was of Hilary rm 1833, 3 Will. 4. Crowder for the defendant phied for a nonsuit, on the ground that the second it being tested on a day after the return day of the at, (though in the same term) was not connected with e first, which was not regularly continued down so as support the declaration. He cited Taylor v. Gre-(4) to show that under such circumstances the atute of limitations was not, upon this replication, arred by the issuing of the first writ. This objection so overruled by Bolland B., who however gave leave the defendant to move to enter a nonsuit, and the hintiff had a verdict.

Accordingly in Hilary term Crowder moved to enter

1834.
Dickenson
v.
Teague.

a nonsoit, stating the above facts. [Bayley B. The second writ, tested on 16th June, being an alias with must have had a preceding writ. The case cited shows that the teste of the second writ might therefore be amended on a cross motion by inserting 26th May instead of 16th June.] Secondly, this instrument is improperly declared on as a bill, for, being drawn and accepted by or on behalf of the same persons (a), it is in legal effect a promissory note. In Robinson v. Bland (b), where it was held that a man was hable for a bill drawn on himself, this point was not taken. [Lord Lyndhurst C. B. Suppose an action by an indorsee against an indorser of a bill drawn by Evans on and accepted by himself, could those facts afford any defence? The effect of a man's drawing a bill on himself in the general form is rather to produce a promissory note, and might be so treated; but as againstthe party who indorsed it to the holder, it may be treated as the instrument it appears to be, or he would be burdened with proof of the legal effect. If a tenan for life grant his estate to him in reversion, that must be pleaded according to its legal effect, viz. as a su render and not as a grant; Moore v. Lord Phymouth cited in Stephen on Pleading, Ch. II. S. v. Rule [Lord Lyndhurst C. B. That is because the legist! effect of the instrument is apparent on the face of and known to the grantee. How can that apply to a party taking a bill of exchange or an instrument repartsented to be such by the indorser? Bayley B. The payee has here indorsed the bill as if the legal obligation was what it purports on the face of it to be. The holder cannot tell that an instrument looking like a bill of exchange is a promissory note because it turns

⁽a) This point also was made at the trial and reserved for the court.

⁽b) Burr. 1077.

⁽c) 3 B. & Ald. 66.

on. That would throw the onus of proof on the otiff.] Thirdly, if this is a promissory note, then, ig drawn by an agent, it is not assignable within, 3 & 4 Ann. c. 9. s. 1., the company not being a reporation" or "traders" within that act; Dickenson Talpy (a). [Lord Lyndhurst C. B. The cases put in act are instances only. If I authorize a person to w a bill in my name I am liable on it. Bayley B. point decided in Dickenson v. Valpy was different. we are to consider whether a mining company such a business as would impliedly confer authority one partner to bind another.] Rule granted to a nonsuit on first point only.

1834.

DICKENSON

V.

TEAGUE.

cross rule was afterwards obtained by the plaintiff amending the second writ in the manner pointed out Bayley B., and making it conformable to the roll, if essary.

Dr. Pollock, Kelly and J. Wilson showed cause inst the first rule, and supported the second. The removes all objections, for it is right from beginning end; and the process appears on it to be regularly tinued down to the defendant's appearance. The ect, if any, is on the writ only, and cannot affect the

Per Curiam.—If the roll is right we cannot look anything else, or allow it to be contradicted. They in called on

Crowder and Follett to support the rule. Under is replication the plaintiff could not give evidence of ocess sued out within the time, or of the entry of prinuances on the roll, the quo minus not having

DICKERSON v.
TRAGUE.

been replied specially. [Parks B. after conferring with Bolland B. It does not appear that this objection was distinctly taken at the trial. It should have been so taken, for the plaintiff might then have given evidence of an acknowledgment of debt made within the six years. It is clear that under a general replication to a plea that the cause of action arose within six years from the exhibiting of the bill, the plaintiff was bound to reply the process, and could not otherwise give evidence of its having been sued out before the exhibiting the bill. If without doing that, he only took issue on the plea, the only question would be, whether there have been a promise or cause of action within the time. But makes all the difference in this case that the plea allegen that the cause of action did not accrue within aix year next before the commencement of the suit; for if the defendant choose to plead in that form, it appears from Beardmore v. Rattenbury (a), that the plaintiff win reply generally and prove the writ, which is the co mencement of the suit. The cross motion seems to unnecessary.] Beardmore v. Rattenbury was the care of an original writ. [Parke B. assented.] When the defendant speaks of the "commencement of the suit;" it must be taken to mean the usual commencement in point of law. That was prima facie the "exhibiting the bill.". The replication should show that the process is intended to be treated as the commencement, and what process it is. Now here the first writ is not connected with the present action. Does not section 10 of the uniformity of process act (which passed 23d May 1832,) apply to the process subsequent to that date?

PARKE B.—The general rule before the late statute for the uniformity of process, 2 Will. 4. c. 39. was, that

⁽a) The report in 1 D. & R. 27, sets forth the plea. See also 5 B. & Ald. 452.

e plaintiff might elect whether he would treat the ing or exhibiting the bill, or the suing out the writ, as e "commencement" of his suit (a). If he elected to ly on the process as the beginning of his action, then, the defendant pleaded that the action did not accrue ithin six years from the time of exhibiting the bill, the aintiff was bound to state the process in his replition; but if the defendant pleaded generally that the tion did not accrue within six years from the comencement of the suit, the plaintiff could not properly ply to the process, but might reply generally, taking sue on the words of the plea, and giving the process evidence to show what was the true commencement the suit. The plaintiff had a right on this replition to insist on the quo minus being the "commenceent' of the suit; though it would have been different the plea been "before the exhibiting of the bill." he rule for the nonsuit must therefore be discharged. be rule for amending the writ being unnecessary, ust also be discharged, and with costs.

In the other point we can only look to the record, must take it to be true without suffering it to be roved or contradicted. The uniformity of process loss not apply to process issued before it passed.

LLAND, ALDERSON, and GURNEY Bs. concurring,

Rules discharged accordingly (b).

ce 1.5 East, 377.

200 2 Will. 4. c. 39. the writ of summons or capies is the comut of every personal action; Alston v. Undershill, ante, Vol. 111. mpsss v. Dicas, id. 873.

hunite v. Lord Montford, unte, 276.

DICKENSON v.
TEAGUE.

1834.

Porter against Cooper.

An indict. ment, prose-cuted by the plaintiff against the a nuisance, having been returned a true bill at one quarter sessions, was traversed to the next. The defendant was not prepared to plead at that period of the second sessions at which by the practice he was bound to do; upon which the counsel for the prosecutor press for judgment for want of a plea, unless the depay the costs of the day. The court said the defendant must either

△ SSUMPSIT. The plaintiff had indicted the defendant for a nuisance at the April quarter sessions for the county of Worcester, in 1832. The dedefendant, for fendant proposed to plead to the jurisdiction of the court, but not being prepared so to plead, or to defend at the July quarter sessions, the following memorandum was indorsed by the counsel on each side, on their briefs, and signed by them :—" Traversed to the next sessions by consent, the defendant paying the costs of the day, including counsels' fees, the prosecutor giving a copy of the replication one month before the next There were six special counts on this sessions." memorandum, and a seventh on an account stated. Plea: general issue. At the trial before Pattern J. at the last Lent assizes for Worcestershire, the above facts appeared. The original indictment was produced by the clerk of the peace in support of the said, he should special counts, indorsed "a true bill;" but it being objected on the authority of Rex v. Smith (a), that it was not admissible to prove an indictment preferred fendant would and found at the sessions, without a caption formally drawn up of record, the learned judge assented to

(a) 8 B. & Cr. 341.

plead and take his trial, or might traverse on the terms proposed by the profession. The parties having come to an agreement, their counsel signed the following the counsel signed the counsel The parties having come to an agreement, their counsel signed the following morandum, indorsed on their briefs: "Traversed to the next sessions by consent, the defendant paying the costs of the day, including cransel's fees, the process giving a copy of the replication a month before the sessions." The costs for afterwards taxed by the clerk of the pence, and the allocatur served on the defendant. When applied to for the amount, he objected to two items, which were will quished on behalf of the procecutor. The defendant's attorney offered at their to give his check for the residue, but did not, it not being pressed for. On a subsequent application for payment, defendant desired prosecutor's attenties to make the subsequent between the parties at the sessions bound the defendant, as an agreement between the parties at the sessions bound the defendant, as an agreement to the agreement taken together with the promise to arrange and pay, and fore that the agreement taken together with the promise to arrange and pay, after ascertaining the amount, afforded evidence for a jury of an account stated.

e objection, and the special counts were abandoned. he evidence in support of the count on an account uted, embraced the facts above stated. It was also own that in the afternoon of the second day of the July sions, the counsel for the prosecution insisted, that by practice of the sessions the defendant ought to have d his plea on the morning of that day, and that he and press for judgment as for want of a plea, unless e, defendant would pay the prosecutor his costs of day. The court of quarter sessions decided that edefendant must plead and try forthwith, or that he ght traverse to the next sessions, on payment of the of the day. The defendant being then presiding chairman at the trial of prisoners in another court, attorney went thither, and having consulted him on B subject returned, and having assented to traverse the above terms, the memorandum declared on was med as before mentioned. The following entry was perwards made in the book of the sessions: " Rex v. B. Cooper and T. Evans. On the motion of A. B. ounsel on the part of T. B. Cooper and T. Evans, gainst whom an indictment was preferred at the last Easter sessions for a nuisance, and with the consent of D. counsel on the part of the prosecutor, it is pridered, that the trial of the said indictment be, and he same is hereby postponed until the next Michaelgeneral quarter sessions, on payment by the said The Cooper and T. Evans of the costs of the day, to Lixed by the deputy clerk of the peace; and it is wher ordered, that the prosecutor do deliver to the Mendants or their attorney, a copy of the replication, Liket one month previous to the next general quarter one." The deputy clerk of the peace taxed the Executor's costs of the day at 431. 8s. A copy of the allocatur was sent to the defendant's attorney Perious to the Michaelmus sessions, and payment TOL. IV. нн

1834.

PORTER

v.

Cooper.

PONTER!

requested, but he replied that the defendant proposed to take the opinion of the court at the next sessions at to the costs, about which there was some mistake When the indictment was called on, the prosecution counsel requested to knew what objection their wan to paying the egets; to which it was suspeced; that 16, 9s, too much had been allowed. It was propered to refer the bill; back to the deputy; clerk of the pasts but on the presecutor's attorney consenting to diseller the above items, the defendant's attordey publicly put mined to give his check for the balance before hedsh the town ... Not : being pressed for it was not size and he afterwards refused to give it ... The destroyer and the prosecutor's attorney having conversed toget ther, on, 23d November 1832, the former desired, the latter to apply to his, the defendant's attorney, whi received his rents, "fand he would arrangelor hays" but on application made accordingly to that gentlement he refused to pay. The defendant's counted contended that these facts were not evidence for the junyous account stated, but Patteron L oversuled that abies tion, giving leave to move to enter a neutrity. He that summed up the case to the jury, who found a recult for the plaintiff for 411. 15s. on the accessing states Maule afterwards moved according to the leave it served; on the ground that there was no evidence any sum due from the defendant to the plaintiff; which could be recovered on the counts for an document stated mand Emerson v. Leshley (a), Fryw. Maloghilly Carpenten v. Thornton (e) Smith will Whalley to a sweet cited. [Lord Lyndhurst C. B. No action could have been! maintained except on an express promise, i si of a contract, December there, instanting most ignivarialist or programmer as, to the old odd. and of the pull to And H. Ble R49: realisant in a chip of Touris 200 loro vil 1997. (d) 2 B. & P. 484. (c) 3 B. & Ald. 52.

1834.

Palfourd Serit. R. V. Richards and G. T. White wad cause. In Emerson v. Lashley it was held, Firstaction would lie to recover costs ordered to be Biby an interlocutory rule of the mayor's court; but t decision cannot apply in the present case, the intiff and defendant having, through the medium of in commed, previously entered into an agreement, to ish this order of quarter sessions was merely ancillary senformable, without proceeding from the breast of ective in Emerson v. Lashley. The following terms pessed by the counsel on their briefs, and mutually and by them, "traversed to the next sessions by conthe defendant paying the costs of the day," consti-Pa distinct agreement by the defendant for paying and costs in consideration of the forbearance exercised the plaintiff, in consenting to a traverse to the next, 12 the third sessions. The consent of the counsel penshag on the briefs, was evidence of that agreewhatever source the consent proceeded. man action was maintainable on it, whether the nider notions made an order in conformity with it or tdishd whether that order could or could not be breed otherwise than by attachment. In Wentwith v. Bullen (a), Mr. Justice James Parks said, Now though there is no remedy for disobedience of dudge's order, as such, by one of the parties against bother by action, but by attachment merely, yet if it cusade by consent of both, and is founded on a lifting agreement, an action will not the less lie upon Managreement, though it have also the additional matica of a judge's order. The contract of the parhe is mot less a contract and subject to the incidents facontract, because there is superadded the comand of the judge. The case of an agreement to efer by order of a judge is a familiar instance, many

PORTER COOPER.

14.21

actions being brought on such agreements. The defendant's agreement in this case was to pay the plaintiff his costs of the day, on good consideration. Then Riley v. Byrne (a) applies to show that the actual by the deputy clerk of the peace operates as meaning the plaintiff his costs of the day, on good consideration. Then Riley v. Byrne (a) applies to show that the actual by the deputy clerk of the peace operates as meaning the plaintiff his costs of the actual by the plaintiff his costs as between attorney and chent. The defendant made an apology, which was accepted. By a substitute of court payment was ordered of off. Its. costs of the actual payment was ordered of off. Its. costs of the actual has been given into by the defendant was such as to constitute a determine the provable under the commission, that the defendant having agreed upon good consideration to pay what should be found due for the plaintiff or the plaintiff could be interred.

Sacondly, assuming nothing to be due to the plaintiff could be interred.

Sacondly, assuming nothing to be due to the plaintiff could be interred.

stated, between the parties so as to maintain the saccounting, and independent of it, could be proved accounting, and independent of it, could be proved accounting accounting, and independent of it, could be proved accounting accoun

⁽a) 2 B. & Adol. 779.

⁽b) See post; p. 6641 / 1

⁽c) 13 East, 249.

PORTER COOPER.

them williams that agreed to pay a certain sum for them williams; that admission was held sufficient to support an action on an account stated. It is not support an action on an account stated. It is not support an action of an account stated. It is not support an action of an account stated. It is not support an action of an account stated. It is not support an action of an account stated. It is not support an action of an account stated. It is not support an action of an account stated. It is not support an action of account stated. It is not support an action of account stated. It is not support an action of account stated. It is not support an action of account stated. eld, that the act of accounting with a plaintiff as ollector of the tells of a turnpike, he having assumed that character without leading to the tells of a turnpike, he having assumed that the tells of a turnpike of the tells of a turnpike. award that case, notice of trial had been your con-cater which the cause was compromised on atter which the cause was y the defendant of the plaintiff's title as estopped it y the defendant of the plaintin's title as estopped it om being disputed, in an action against the defendant of an account stated, to recover tolls with which he are been debited for passing through the gate. Here the facts proved demonstrate that the defendant having bjected to two items in the allocatur, the plainting signed any claim upon them; upon which the defendant attorney promised to give his check for the resident of the accounting to be due the lattice of the construction of his debt; for even when under a plea of the lattice of limitations, no item appeared within six years, but the parties had met and settled an accounts though without writing, it was said to be a new cause of action; his said to be a new cause of action; his said to be originally indebted to the plaintiff. The defendant cannot go into the original cause of action, for if he has made a contract which is not alleged, he is bound by his promise; Elworthy v. not alleged, he is bound by his promise; Elworthy v.

Bird (a). Here, he contracted to pay the costs
if the trial was postponed. By stating and account
with a person, the defendant may recognize a title in
him which will enable him to mainly a hall a count. and no dollass ha mistriam of mid ald an altitude mid that case, the defendant, after he had been than the defendant.

⁽a) 10 East, 104. (b) 3 M. & S. 65.

⁽c) 13 Each, 249. 1. 114 1 14 (d) 13 Pri. 222, 4 Sim, & Stu, \$79, \$80.

PORTER v.
Cooper.

account stated, though he could not have sued on the original contract; Peacoch v. Harris (a).

A nonsuit cannot be entered, for the original indictment found at the sessions was improperly rejected in evidence. Rex v. Smith does not apply. The court intimated that they would hear the arguments in support of the rule; and that if they prevailed against those which had been urged, the plaintiff's counsel should be heard on the point last raised.

Maule and Currood contra. This action is not maintainable at all, either on the special counts or the account stated. Here was no agreement to pay a certain sum for costs, or to pay the costs to be afterwards ascertained. For the result of the evidence is, that the parties appearing in court by their counsel, as arrangement was consented to between them, to adjourn the hearing on certain conditions. But that arrangement could only be carried into effect by saiction of the court; their order being as necessary to perfect the arrangement of the parties, as the consent of the latter was to making the order by the court The agreement by the counsel representing the parties, was only to postpone the trial. If that could be sued upon, the action would be for not consenting to the officer drawing up the order of the court, embodying the above terms. [Parke B. The meaning of Wentworth v. Bullen was, that the remedy is not confined to actions on agreements entered in under stat. 9 & 10 W. 3. c. 15. s. 1., but extends to orders of reference drawn up independently of that statute. The argument now raised would apply if the contract were only to adjourn the trial, but it has been contended to have been for payment of the money by the defendant

ROPER.

in consideration that the plaintiff would forego, his right of insisting on a trial at the then sitting, quarter, stations, and postponing it to the next. Cases were rifed to show that this was an agreement to pay the 9988 of the day secured by this order,] . The indomen ment of counsel was merely an instruction to the officer adraw up the order and ancillary to it, if the agreenent was only that the parties should put themselves n a situation to be bound by a sule of the gourt of quarter sessions. [Parke B. The only question is, shether, there was evidence to go to a jury, on the munt, stating an account stated. If there was the ncaning of the word "arrange" being equivocal, the spacin which it was used was for their decision die Itils submitted, that the facts proved afford no evidence to to the jury; for the defendant merely referred, to attorney, to see, whether he would arrange or pay. Parke B. His attorney was mentioned as the person the reseived his rents.] Perhaps these expressions of the defendant would have been sufficient evidence if it appeared that ap action was originally maintain-But the agreement on the other side is it that even before these expressions of the defendant, the action could not be supported. Those expressions are of gainsened to enable the plaintiff to recover 101 and 101 an -poding stated. But it would be dangerous to hold that a mere statement by the defendant of the amount lapute should confer a right of action, where there yes no ground on which it could have been previously supported No such position as that contended for is blished by Knowles y, Michell or Peacock y, Harris The B. It comes to this whether an action could be sustained on this agreement, when executed to recover the goets? It is not contended that the party could sue if there was simply an order of court, without an agreement. There would be difficulty in sustaining PORTER

V.

COOPER.

the last count if the original demand could only be enforced by attachment, I was a source of the control of th

PARKE B .- I think this rule ought to be discharged, and that there was evidence for a jury in supports of the count on the account stated I agree with what my brother Alderson has said, during the argument that in the later cases the courts, have, deviated way far from the meaning formerly ascribed to an account stated. The present rule I take to be this, that if a fixed and certain sum is admitted to be due to a plain tiff, for which an action would lie, that will be evidence for a jury in support of a count on an account attack. Here was a conditional admission by the defendant of an amount previously due, for only two of the items allowed on taxation by the deputy clerk of the peace were objected to by the defendant, and were given up by the plaintiff without sending them to a proposed new The allocatur had made the defendant aware of the amount taxed by the quarter sessions, and claimed by the plaintiff; so that when being subsequently applied to to pay, he said, "Go, to Mr. Beak who receives my rents, and he will arrange or pay." The meaning of those expressions was clearly for the jury to consider and to decide on, whether, they, did not amount to an admission of liability under the agreement, and a promise to pay the sum so due? ,, | 1

That brings us to the question, whether an action was originally maintainable in this case, as on an agreement? If there was merely an interlocutory order of sessions, I should have been of opinion that it would not. To make out that it would, an agreement between the parties must be shown. That here depends on what occurred at the sessions, and it seems to me that what did take place there, would have amounted an agreement between the parties independently of the

1834. Porter

COOPER.

order of court. The defendant was bound to plead at the second sessions, but was not ready with his plea. The prosecutor's counsel stated in court to the effect - that he should then press for judgment for want of a iples, What is, that he would not forego his right to try " that besions.) unless the defendant would pay the drasecutor his costs of the day. The court seems to Tieve Highiated, that if the parties did not come to Wernis, they would enforce the right of the prosecutor. Door this, a negotiation took place, which ended in and ligreement, amounting to this, that in consideration This the projecturor would forego his right to insist on - the defendant's pleading immediately, the defendant protinged to pay the prosecutor his costs. applears to me to be a binding contract, wholly inde-Beddent of the order of sessions; then an action might Se Haintanied on it, and this rule must be discharged. had been proposed new

the take depended wholly on the order of sessions, I would have been of a different opinion. But there will being aware of the sum claimed, referred the plaint being aware of the sum claimed, referred the plaint being aware of the sum claimed, referred the plaint being aware of the sum claimed, referred the plaint being aware of the sum claimed, referred the plaint being aware of the sum claimed, referred the plaint being aware of the sum claimed, referred the plaint. The meaning of those words was for the jury, and I wink they have assigned them the fair construction. The plaintiff is therefore entitled to retain his verdict the count of an account stated.

Attraction B.—I am of the same opinion. The bloom referent cases have certainly established, that a climic of an account stated will be supported by evident that the defendant admitted a certain sum to be the in respect of a demand for which an action would be supported by the control of a demand in this case? It

PORTER U. COOPER.

cutory order of a court. But what the court of quarter sessions did in this case amounts to no more than intimating that they would not object to any arrangement made by agreement between the parties. The arrangement made was entered into by virtue of the agreement and consent of the parties. All depends on that agreement, though its terms were afterwards sanctioned and assented to by the court. The number be paid for costs was afterwards ascertained, and being made known to the defendant, was spoken of by him in terms affording evidence of his promise to pay. I concur, therefore, in opinion that on these facts the count on the account stated was supported.

GURNEY B. concurred.

Rule discharged

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and grading the

MESTAYER against Biggs. But bin flow

The condition of a money bond was for payment to the plaintiff of an annuity of 150l. by quarterly payments, after previously reciting that the obligee had contracted with the

DEBT on a bond, dated 10th October 1826, in the penal sum of 2000l, conditioned for paying to the plaintiff an annuity of 150l. by quarterly payments. The breach laid was, that previous to the action error ral quarterly payments were due and in arrear. Place non est factum. At the trial the plaintiff had a verdict, subject to two points reserved, on which the defendant had leave to move to enter a nonsuit i first.

obligor for sale to him of a messuage, &c., in consideration, among office things, of the annuity; and further, that on the contract of purchase of the message, it, we agent that for the better securing payment of the said annuity, the obligor should execut that bond:—Held, that the bond was properly stamped with a \$1.150 deed start within 55 G. 3. c. 184.

Held also, that the want of involment under 53 G. S. c. 141. the annuity act, common not be raised as an objection upon non est factum; and that if it could introduce not prevail, as involment was not required under that act, the consideration of being pecuniary.

that the bond should have been inrolled according to the annuity act 53 Geo. 3. c. 141. s. 2.; and secondly, that the deed stamp of 11. 15e. was maufilcient. The condition of the bond recited as follows: Whereas the above-named Mary Meetaver lately contracted with the above-bounden J. Biggs, for the sale to him the said J. B. of a messuage &c. in consideration of, among other things, an annuity or clear yearly sum of 1501 to be paid to her the said M. M. during the term of the natural life of the said M. M. by the said J. B., his executors or administrators, at and by four equal quarterly payments in the year, as hereinafter expressed: And whereas, on the contract of the said purchase, it was agreed, that for the better securing the payment of the said annuity of 1501, the said J. B. should execute the above-written bond or obligation, conditioned as hereinafter mentioned. Now, the condition of the above-written obligation is such, that if the above-bounden J. B. his heirs, executors and administrators, or any or either of them, do and shall well and truly pay or cause to be paid unto the abovenamed M. M. her executors, administrators, or assigns, one annuity or clear yearly sum of 150% yearly and every year, up to the last quarter's day of payment preceding the decease of her the said M. M. by four equal quarterly payments, on 10th January, 10th April, 10th July, and 10th October in each year, at or in the common dining hall of the Inner Temple, London, between the hours of twelve and two of the clock in the day time; and also in case the said M. M. shall happen to depart this life upon either of the said quarterly days of payment, then if the said J. B. his heirs, executors, or administrators, do and shall on demand pay or cause to be paid unto the said M. M. her executors &c. the whole of such twesterly payments, and do and shall make all and every the said payments, without any abatement or

1834. Mestayên v. Bioos. 1834. Mesta yea V. Biggs.

deduction whatsoener, for open appount of any charges. taxes, rates, assessments, or, other) matter; or, thing whatsoever, whether ky authority of appringment of otherwise howsoexer, and do and shall make, the first payment of the said homeity, or yearly sum of 1501 on the 10th January mext ensuing the date of the above written obligation, and do and shall payoup all costs. charges, and expenses, which may have been incurred by meason of any default in payment, thereof, then the abone-written obligation shall be void, or eleganemin in full force and entire to quart off to organs off nidia in those acts must be construed in the ordinary score ..., Couldny showed cause.... The appital, shows that the annuity was granted in part, payment, for a house, sold by the plaintiffico the defendant. The west of ingl ment, ih not admissible on non ast factum aud Besider which, the annuity act 53 G. S. c. 141, does not apply to amuities granted without pecuniary; comideration, as in this one ... James .. James (4) ... Combarland ... :Kally (b), are in point and collect, all the authorities As to the stamp objection, this, bond, is gornetly stamped under the daute for, stamping honds and deeds in general. The 55 G. 3. c. 1844 ach tit Rond. is as follows: hill Bond in England and personalist heritable band in Spettand, given as the only or pringpal security for the payment of any annuity upon the original creation and sale thereof the Seel Conveyage upon the sale of lands, &c.". The chause thus me forred to is sa follows: ". And, where, mon the, sale of any antwity or other right, not before in existence the same shall not be created by setual grant or set veyance, but shall only be secured by bond, warrant of attorneys covenants contract, on otherwises the bonder other instrument by which the same shall be secured or some one of such instruments, if there be more than one, shall be deemed and taken to be liable to the

1884 di vwen M Broos.

definity as an account great to donveyance. The Children danie iteliusa Controvance at the beginning, it apt right is convey thee of whatever descriptions appear lends of any lends to paraller series or of any right "Cherchiene where the purchase on leousideration the Illaids / cheesenquest noquesestilicrosivissionle elle Sant to 2014 is hable to 10 daty on stanping the William of permiser with the dighter benownte of permisery voluments eracion to relation in this minute interior pecuniary consideral History reduced, they bettler theory and or an enmuly hin the scope of the stamp acts. The word wisher those acts must be construed in the ordinary sense a sale for peciniary consideration which has been Mi 186 be the only sale of an amounty included in in all unity wast. I' Note: wast the samuelity wold; for the in the side of the house was the consideration which, the annuty act 55 G 5 c. 141, distribute THE Rellowing three junder title "Bond" min be re-Find withe defendament. ... Bond in England; and per-1194 Heritable Bother in School and given us a colleged BEIGHar security for the payment of any andairy upon . aireadal areastoir and sale cherebt, where the same MI be glanted, or convered for secured sub-budy EF 97384 by inbusiness liable of and chalged with THIS ad Palotess duty herestuder introded but god-ANGEL Chillien side of any property will yin Bot this May Hovald? being of higher amount that that thus AnddoruThe two next claused to that applying tr wothly affect bonds what given but the original crea-Billis side of the amount in Now, the condition shows h Boddists be given on the original contract for the Bandy by Merters (a) is the point of the was mediatilice of rectain stocky with remainder to her HERrer dile defendants wife." By indenture obteled By the puries, the defendant was to be empowenc. shall be deconged and taken to be liable to

5 s. & Adel, 602. (a) & Br. & B . 0. MESTAYER
v.
Broos.

cred to sell out the stock and pay L. an annuity for her life, equal to five per cent. interest on the principal money produced by the sale of the stock; and that certain policies of insurance should be assigned by way of further security. For the defendant it was insisted, that the stamp on the deed, a common deed stamp, was improper, and that an ad valorem stamp was necessary, the transaction being a sale of an annuity. and a conveyance of "property" within 55 G. S. c. 184, sch. part 1; but Lord Tenterden held the contrary, and that the transaction developed in the deed could not be considered a "sale" of an annuity in the ordinary sense and acceptation of the words. Parke J. asked "what purchase or consideration money was expressed" in the deed?" Then the plaintiff is entitled to retain his verdict.

Mansel in support of the rule. Hill v. Manchester Water Works Company (a) shows, that upon the plea of non est factum, the defendant might prove such noncompliance with the requisites of the annuity act would render the bond void. But the bond should have been stamped with a 41. stamp, for stat. 55 G. S. c. 184 schedule, tit. Bond, is in the following terms: " Bond in England and personal and heritable bond in Scotland, given as a security for the payment of any annuity (except as aforesaid, viz. on the original crestion and sale thereof,) or of any sum or sums of money at stated periods, (not being interest for any principal sum, nor rent reserved or payable upon any lease or tack), for the term of life, or any other indefinite peried, so that the whole money to be paid cannot be previously ascertained, where the same shall amount to 100% and not amount to 200% per annum 4 Here, no principal instrument creating the animal

exists, and the clause applies to all cases where there is no other, creation or any principal instrument creating the annuity. To hold this stamp sufficient would be to induce parties to defraud the revenue of stamps, by reciting a prior creation of an annuity, which never 1994, place. The consideration for granting the annuity is in effect pecuniary.

MESTAYER

V.

BIGGS.

dation for either objection. The stamp is of the proper amount. For on the face of the instrument it is given originally, and is not a mere collateral security subsequently given. Then it must be stamped either bear original conveyance, or as a collateral security on it. If it is an original conveyance, no pecuniary consideration appears on the face of it, and therefore the clause imposing an ad valorem duty does not apply. On the other hand, if it is a collateral security, the stamp is larger than necessary. The later clauses of the schedule do not apply. The case falls within the non-non-land v. Kelley is decisive that this transaction is not within the scope of the annuity act. However, that build the scope of the annuity act. However, that build campot arise on non-est factum. Defences arising on statutes must in general be pleaded. Hill v. Massekester Water Works Company does not apply, for the defendants there disputed the fact, that the seal on vegoring the statute of the company.

Benefind Bundy v. Herbert is decisive of this

ALDERSON B. This is clearly a security given on the original creation of the annuity. Then the stamp is sufficient, for the reasons already stated.

GURNEY B. concurred.

Rule discharged.

Hilary 1835.

the first the Easton against Pratchett.

This case was argued in Hilary term, 1835, but it was thought convenient to the profession to give it a place in the present part.] deller eren

In an action on a bill by indorsee against drawer the plea was, that the defendant indorsed it to plaintiff, without having or receiving any value or consideration whatsoever for the said indorsement thereof, and that defendant had not at any time had or received any value or consideration whatsoever for or in respect of such indorsement. Issue having been joined on this plea, the defendant had a verdict. Held that this plea, though bad on special demurby verdict.

A defence that A. paid part of the bill sued on, and B. the residue, is the subject of separate pleas.

the thing pale SSUMPSIT against the drawer of a bill of exchange by his immediate indorsee. The bill we dated 15 May 1832, being for 100%. payable to the drawer's own order, at four months after date for value received in spokes, and accepted by one Mad-Second count on an account stated Ples dock. to the first count, that the defendant indorsed the bill to the plaintiff without having or receiving any or in respect of value or consideration whatsoever for or in respect of the said indorsement thereof, and that the defendant has not at any time had or received any value or consideration whatsoever for or in respect of such inderement; concluding with a verification. Replication that the defendant heretofore and at the time of indersing the said bill to the plaintiff, had and received from the plaintiff a good and sufficient consideration for and in respect of the said indorsement of the said bill to his the said plaintiff as aforesaid; concluding to the county

The second plea was to the second count, so far a the promises in that count related to the bill of change in the first count, and averred payment of the amount of the bill by defendant to plaintiff, and accept rer, was cured ance by the plaintiff in full satisfaction thereof. cluding with a verification. Third plea to first count, payment by Maddock to plaintiff of 501. on account of and in part payment of said bill, which plaintiff cepted in full satisfaction and discharge of 50% paid of the said sum specified in the bill, and payment by

defendant to plaintiff of the residue of the amount,

which plaintiff accepted in full satisfaction of the said bill, and of all damages in respect thereof, and of all claims thereon against the defendant. Verification. PRATCHETT. Fourth plea to the last count, non assumpsit. Issues in the above pleas, admitting the payment of 501. by Maddock stated in the third plea. The particulars of the plaintiff's demand were wholly confined to the bill. At the trial before Gurney B. at the summer asses Lancashire, the defendant's counsel called the ac-Leptor Muddock, who proved, that in March 1832 the "deferidant acted as agent to the plaintiff for the sale of "Bokes," and that at his request the withess bought * dertain spokes belonging to the plaintiff, on the terms "of not paying for them till they were sold." That the "defaildant afterwards applied to him to accept the bill in built, but the witness had not then sold spokes to the what terms he accepted the bill, the question was objected to, on the ground the bin being unconditional on the face of it, could 'st be varied' by oral evidence to the contrary; Mosely Wir Hanford (4)! The witness afterwards paid 501. to "He which bayment was whited in the third replication. Evidence was given "Le the defendant afterwards sent 991. to the plaintiff WHEE affithe will!" Verdiet for plaintiff on the second "hif third pleas (of payment), and for defendant on the 2 2 nd fourth issues: the fury finding on the first plea. Light the bill was an accommodation bill," between the

Carnetife and the defendant; hadored by the defendant Wathout good tollanderational in thinning only on your .3 22 199 Michaelfinds term 1834," Alexhinder thoved to set

- archiffific Chaffen, The terms in fact, early that the bill should be Taken up by the plaintiff when due, if sufficient spokes to answer its amount were not then sold; and that when the bill became due, only 201, worth of the west state of the sold; and that when the bill became due, only 201, worth of the west state of the sold; and that will not be sold; and the sold of t

Hilary

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perment by Maridack to pleintiff of 500 on account of

FOL. IV.

HUMAN 1886.

aside the verdict for the defendant on the first issue, and to enter judgment for the plaintiff non bistants veredicto on the first plea, contending, that as it did net exchide the case of consideration having been re! ceived for the bill by another person, it was no answer to"the declaration [Lord Lyndhurst C. B. "What evidence is there to show that there was no consideration between these parties; the indorsee and drawer? Alderson B. The evidence goes to want of considers. tion between the plaintiff and the acceptor; whereat the pleading is directed to want of consideration between the plaintiff and the drawer. Parke B. As he proof appears of want of consideration as between these parties, the evidence objected to was not made rief (a). The court intimated a doubt whether it was not consistent with the first plea that the defendant might have been only a guarantic for another, i andgranited the rule, as a sum of test att a comment of the again safe fight of the contract of the contract Secressor subse-

Crompton (with him the Attorney-General Shr 1965) derich Politick) showed cause. First, the plant is good after verdict, if not on special demarrer; secondly, if not on special demarrer; secondly, if not ented by verdict, a repleader should have been prayed; thirdly, only a venire de note than he granted, as the jury which tried the haues have assessed no damages on those found for the plaintiff.

First, the pless would be good on special designification in the plaintiff without having or receiving any value, but adds, "or consideration whatsvever, for the plaintiff by forbearing, at the defendant request, and the plaintiff by forbearing, at the defendant request,

Same of the C

⁽a) He had also moved for a new trial, on the ground that the acceptone had been permitted to state the terms on which he accepted; though the learned baron afterwards repudiated that portion of his evidence. The part of his motion was refused.

EASTON V.
PRATCHETT.

Hilary

to sue a third person for a debt, or the benefit received by that third person at the like request, would be 1, good consideration for a written promise by the lefendant, though he did not corporeally receive any ectual personal benefit (a). That consideration might have been given in evidence under this plea; for a conideration need not be tangible, and "having" is not ranfined, to the defendant's corporeal possession, but, nay include the benefit enjoyed by another at his request. It is said that the case of the gift of the bill o the plaintiff is not excluded by this plea; but unless. such a transaction is nudum pactum, the gift itself would ne a consideration. If a gift of a bill yests a title to it n the donce, it cannot at all events be sued on without report or presumption of some legal consideration. Holliday v. Atkinson and Others, Executors (b), the plaintiff sued on a note given to him when a child, nine. years of age, by the testator, and expressed to be for. where received. Hullock B. told the jury that the note. being for value received, was prima facie evidence of pe legal consideration sufficient to sustain the prowhich presumption it was for the defendants to lisarove. He said that many good considerations Picht have existed, but added, that affection to the intiff or gratitude to his father would suffice. rdiet for the plaintiff a new trial was granted, Lott C. J. saying, "It was a question for the jury, mether the note was given on any legal consideration, I think that the direction given to them, as to the **Exciency** of gratitude to the father or affection to the The subject-matter of the consi-. exation must not be confounded with the consideraitself. If the gift of a bill is not excluded by the

⁽a) See cases collected Chitty jun. on Contracts, 2d ed. 26; also 1 Rel. 18, ph. 49; King v. Wilson, Stra. 873.

^{(1) 5} B. & C. 503. See Woodbridge v. Sporner, 3 B. & Ald. 233.

Islahy ISST. Energis Energis Energis mard ffilionsideration in the pleasant mental filionsideration in the pleasant mark eritendito this, that an action of is simple control busy belsupported, without preoptidentions and that pailtion cannot be maintained of The londy difference in the cabonaficobill thinaterism that it imports a diskideration tillisthencommuny is provoding That; be reduced ishows spmg | consideration ita baiss necessary for a hills alifer stiller contracts. In Thus a prior moral drieven beiteurs ble phligation (a); or a debt disc from a third person to the mayee, Popplehelling Wilson!(b), are igded: consider attomorator arbillator note with The plaintiff has difficient a donaideration moting to him wif, be obtaine the suc pendiohinf, the plaintiff's right to lsud a thirth person Ablehede Bill If the critical the third state of the conf money dent, by the payer to the diametr they also wouldings; this issue the confined to priof come whenly consideration only. Rerhaps the defectlant wantes boutfd: the deny or extinde moter in his pleat than in will leged onimplied in the declarations vizithe presumption of law (that a money consideration passed the like on the parties to the billion On: this spices unprison it in it has ea hetween the roriginal perties; subil or motories in the prima facia evidents in aupport of the chunts for suche lent, paid, had, and received. This in pleas however, denies the desentant's having held any specitions den sideration, "[Patka, B, | The question is whether the plen is good; efter varidict? ... [World the defendant diese been liable had he indersed this hill so the altistiff by way of gift without consideration? The older cases seem to show he would (e). However, in the tile cases the court of King's Bench has held the contrart.

onder sei ver ap die Z. d. genera ni nathwell (4 N + hill (2) (a) Lee v. Muggenidgesick, Taunt. 36; Gibb v. Mangille & Frant. 34. See 2 Bla. Com. 445; 3 Ros. & Pul. 249 n.; Bayley on Bills. 4 al. 39.

⁽b) Stra. 264; Sowerby v. Butcher, ante, p. 320.

(c) See Williamson v. Losb, cited in T. T. R. 353 (and thirty is Paper-books in Chitty sen. on Bills, 5th edit. 93, n., and in Chitty is

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usique sidensialestitionesit the service servi athender the the the property of the contract per ment studies were not hamed walther view researched besied pleading electroly breadness finithere has up to a plea itethbidilb watredventiforthe blantiff slidcommodes nyithennulay(a) rather points up a consulation within Appendictantic province in the contract of the native of each discuss us the present should be left hespogybeithy: theridefination. "Might motorial optic bis been object the bill was drawn for the accommodel a flimming and the bright and the confidential as white in the confidential of the confidential and the confidenti marlandicinflored to weith or their hater merely free his senspolizition? puzito weiger, zifishe splead would cilure modelie ver edentieren fognundigulty that defect lid adelby-wirdion for other equiveral dixinestions must which this put a like the second of the seco dinty Multingstweets. Purtitler (b) (Hobids of) Mich Builkeiladen rei ehl halchbotoold besynkerkiben inch legWi 408113 liel in Held calcalation of its eath eather the of the wroth a transplictly loops which make a sign described and the comments of the comments editlesti in the westigation; "Stoudklow's. Denity) ni citedicame disos demiterer lanitaiverdiet curestani manal disaterith joileds, though without i proper fering lent, paid, had, and received. (1) inical dairstance detribited the liberate bearing bold with Decidences water since she the last test to the second to the last t shaged the brief that took de beignanted would Biteidendels, the lidefest being more some actual in the way of gift without consideration? The older car av. Hugher, 7 T. R. 331, n. As in Seton v. Seton, 2 Bro. Ch. C. 610, pp. 107 April 1982 av. Hugher, 7 T. R. 331, n. As in Seton v. Seton, 2 Bro. Ch. C. 610, pp. 107 april 1991 Set 120 April 10 Truou 911 1992 av. 10 Truou 1) Hil. 4 W. 4., Pleading in assumpsit, No. 3. p. xv. this volume.

⁽a) I ce v. 202 growing Golfeyet. Set; with v. Magging Bright Bright Co. Magging of the Co.

See 2 Bla. Comeckin midre. (Sylval. 249 m. Beyley on this glock (

f) Aleyn, 10. with a particular product or adverses (432 and 36)

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Hilary 1835. EASTON v. PRATCHETT. substance as in stating it in a manner which raises an immaterial issue, on which the court cannot give judgment between the parties (a). For judgment non obstante veredicto is only entered where the pleading of the successful party being good in form, and the verdict being found for him, yet it is clearly apparent to the court that he can have no merits (b). Were the rule otherwise, a party might go to trial, passing over an error in the opposite pleadings, not touching the merits or title there recited, and after verdict against him successfully rely on it to obtain judgment non obstante veredicto.

Lastly, if the plea is not cured by verdict, still as m damages were assessed to the plaintiff on the issues found for him, the verdict on them is void, and a venire de novo must issue to try them again; for the jury who try the issues must assess the damages; and if they neglect to do so, or make any other omission, for which, before 6 Geo. 4. c. 50. s. 60., they would have been liable to an attaint, the court cannot ascertain the damages by writ of inquiry; Clement v. Lewis in error (c), Bentham's case (d), Cheyney's case (e). It may be that the whole action is discontinued. [Parke B. The third plea is bad; it should have alleged as to 50%, part of the bill, that that sum had been paid by the acceptor, and then concluded to the country. It should then have been stated in another plea, that the defendant paid the residue of the bill, but the verdict has cured those errors.]

⁽a) See Stephen on Pleading, 1st edit. 119, citing Hobert, 113, 225 Taunt. 386.

⁽b) See Tidd, 9th edit. 922, cited 2 Saund, last edit. 319 c, note (c)

⁽c) 3 Br. & B. 297, 7 B. M. 200, S. C.

⁽d) 11 Rep. 56 a.

⁽e) 10 Rep. 118 b. and note in vol. v. new edit. 466, collecting the cases.

IN THE EXCHEQUER OF PLEAS.

Hilary
1835.
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0.:
PRATCHETT.

Alexander and Cowling contral. The plea is bad in substance and not cured by the verdict. The words "value and consideration" being used in a plea, require meater strictness of construction than in a declaration, for ambiguum placitum interpretari debet contrà prospentem; Co. Lit. 303 b (a). These words, read in , popular sense, must mean an apparent and tangible omsideration. [Lord Abinger C. B. Your argument , that the plaintiff having taken issue, whether or ot consideration was had and received from him y the defendant for the indorsement, could not give evidence that he had received the bill in consiexation of his forbearing to sue another, but could ily prove a tangible consideration moving from him the defendant. Our construction of the plea must more liberal after than before verdict. Parke B. apposing the consideration to have been the plain-E's forbearance to sue another, that would have been **good consideration** for indorsing this bill(b).] If the At of a bill of itself enables the holder to sue without urther consideration, and is not nudum pactum, the les does not exclude that consideration for this inorsement, Holliday v. Athinson (c), and Woodbridge v. pooser (d) are rather contrary to the older authorities, bough in the latter case the plaintiff recovered without report of any actual consideration, the note being payable an demand, and expressed to be given for value reeived, and for the kindness of the holder to the maker. Pillans v. Van Mierop (e), the court leant to the pinion that a simple contract to pay the debt of mother if written, but not under seal, needed no consi-

⁽a) See instances collected 1 Chitty on Pleading, 4th ed. 458, 213, 270, 116, 331; new edit. Coke's Reports, vol. v. 353, n. B.

⁽b) See Popplewell v. Wilson, Stra. 364; ante, 324.

⁽v) See Poppieweis v. Wilson, Sua. 303, ante, 3

⁽c) 5 B. & C. 501. (d) 3 B. & Ald. 2331

⁽e) 3 Burr. 1663. See per Lord Mansfield and Wilmot J.

Hilsty 1835. Easton v. Pratchett.

deration, orthonored sparkings iconsideration i libertl Abingen, C., Bio Antonhands, their particulated estapital by the deed (a) is hist and our ritten agreements not builde seal, it is differentil "The contrary docttion to Pillant y., Kan, Mierop, has, been, sinne, laid, downide Money Hughes (b), and Johnson [No Colling to) 111 Liord Assent G. B. In Pillana Walker Midney the redidity of a batchel promise to except a bill notithen drawn was shoulited at ether. grounds hesides that information bicarion of The enactment of 138 9 640. 4 cultbrail conducting inland bills.]....In Clarky. Conk (ally anil Bate to Wife bert (e), Pillans v. Kan Mierop is again sited and valid authority, and the equity cases of Taters. Hilbers, and Saton, y. ASpton. (f), are in favour afirmainteining at action on Augusta, given to the holder to Mindish on Chate (g) is gited by Blackstone in his Continentaries (s) as, showing that a man who laived a promised by note shall not be allowed to layer a want of consideration it order to evade, the payment; for the ideases's sain ngtung carries with it internal exidence of an good bonsideration on a billibis Charles v. Marinen (1) tind Lafence v. Lloyd (k) were also cited bas independent other gonsiderations for the bill which mentionet test chided by the pleaning Buche Bor Those leader the cute apply to this question In Stein dou Vollsider which came on here on demurrer to a plea in last Michaelage tennin Charles v. Macaden was cited toughout that this fact of want of consideration, even when coined with E - Abinger C. B. Can you cay that the drawer in this if (h): 2. Bh. C. 295, Cont. Dig. Betoppel, (Alygn. 9. 40 Adland; 98. - Trother's emburussatismenta & Alain Agality ; 144-64, 2 (b) In error, ? T. B., 350, n. (a); ? Bro, C. P. 51. S. C. pub 1da (c) 1 East, 104. (c) 1 East, 104.

(d) 4 East, 70.

(d) 5 East, 70. (f) 2 Br. Ch. C. 610; but see Lord Redesdale's note, 5th ed. (g) Lord Raym, 760, State State of the thinks of the 446it 2 to -(i) 1 Taunt, 22 L (k) 5 Tauna 25091 v (= ->

tiof indersument after the bill became due, does not india defence if pleaded, without going on to aver withe plaintiff gave no consideration; and we gave We to amendi] If Pillans v. Van Mierop is no longer qualit this issue is confined to consideration received defendant for the indorsement, and does not stade consideration received for it by any other. If bill had been drawn and indorsed by the defendant the plaintiff at the request of the acceptor Maddock mebpumodate him, then a consideration would have hed soin the plaintiff to the acceptor, who might we been stied wastevens v. Wilkinson (a). The ques-1 . Want of consideration cannot arise in actions inderser against inderser as the sole defence, for Aliability of the acceptor is the defendant's consistions and indicated Maddock and the defendant, whose at undertaking the bill was, indorsed it jointly with nadefeedant; the latter could not have insisted on at act consideration, Price v. Edmunds (b), Perfect Manyreve (o) on Popplewell ve Wilson shows that the st of another is a good consideration for a person's dings himself by a bill. That case was cited for at spoint, in Soverby v. Butcher (d), by Bayley B., pailded, that "the donsideration of a bill need not manily be such as would maintain an action on a phialochitracti'ii That transaction was a mere gift of s hills by the drawer to the payees, the plaintiffs, thouse moving to the drawer. [Lord binger C. B. Can you say that the drawer in that be had not consideration if he desired to cover his other's embarrassment, and volunteered to pay the bt due from him to save his credit? On a similar ound, all the cases in which detriment to a plaintiff

Hilary 1835. Baston v. Pratchett.

⁽a) 2 Bi & Adoli 326. See judgment of Parke J. (b) 10 B. & Cr. 582.

⁽c) 6 Příčítí.....

⁽d) Ante, p. 324.

Easton v.

Hildry

resulting from his reliance on the primise of its defeatant; hab been held to be a good consideration for such premise, would be excluded by this plea and not builty a consideration had or received by the defendant. Now the courts have held, that if is defendant has lind his wish and attained an object not illegal by means of a promise made, that promise shall be binding. ... Thits a party who guaranties the act of another received no consideration for incurring that liability: his object is not tangible, being either to help his friend to obtain credit for him, or the like; yet it is equally gamed if that aid is rendered or that credit afforded: and he is therefore held liable, subject to the provisions of the statute of frauds as to form. The consideration to the party guarantied arises from the goods he obtains in consquence of the promise; the consideration to the batte guaranteeing is the obtaining the object he had in view. of obtaining a benefit for his friend. Each has a sepirate consideration of a different kind.]" Had the dechration been in debt the blea would perhaps have been sufficient; but though the plaintiff might have a good cause of action against the defendant, debt might abt be the form in which it should be brought (2) 19 The plea should have stated that the indorsement was made without a good and legal, of any consideration in Shier and others v. Dovers(b), Hedges v. Sandon(b). Pathe B. In Hedges v. Sandon those words occur only in the indorsement, not in the traverse. No discontinuance can happen, for this plea, professing to allswer a part, _ 4 answers not the whole, but that part buly (a)?" No. can a repleader be granted in favour of the person making the first fault in pleading, it will only granted in a case where the court see justice things be

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⁽a) See Anon. Hardres, 485; Freeman v. Freeman, Rol. R. 61

⁽b) 3.Doug. 428. (c) 2 T. R. 439. (d) 1 Wms. Saund. 27 n.

tiens without sending the case down again (a). As to the busission to assess damages on the issues found for the plaintiff, the ground for not awarding a writ of inquiry to ido so was, that the remedy by attaint under 34 Edw. 3. c. 7, would thereby be lost; but as that proceeding, so long obsolete, has been formally abolished by G-Geo. 4. c. 50. s. 60. since Lewis v. Clement was decided, cossante ratione cessat lex.

EARTON O. PRATCHETT.

Hilety

On a subsequent day the judgment of the court was delivered by

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Cur. adv. vult.

Lord Aninger C. B.—This case came before us on a rule for entering up judgment non obstante veredicto on the first plea; and the question being a matter of importance since the new rules, we thought it right to take a short time to consider our judgment. The defendant, the drawer of a bill of exchange, was sued as inderser by his immediate indersee. The defendant pleaded that he indorsed the bill to the plaintiff, without having or receiving any value or consideration whatapever for or in respect of such indorsement, and that he had not at any time any value or consideration for the said indorsement. Issue having been joined on this plea, the jury have found for the defendant, viz. that there - was no consideration for the indorsement of the bill. A motion was efterwards made to enter up judgment for the plaintiff notwithstanding that verdict, on the ground that the plea was insufficient; and a rule having been granted in last term, the case was very learnedly argued on both sides. We have considered it, and are of opinion that this plea, though it would be clearly bad on special demurrer, is sufficient after verdict. would have been bad on special demurrer before the

IN/THE EXCHEQUEROXX PHEASI

Hilary: 1835; Easton v. Paatchett;

late general rules came into operation because it would amount to the general issue only oper dock at appeared which at minute those mules, such a pleason be signi ported. Before they were made, the defendable basin many cases able to throw on the plaintiff the bunded of proving affirmatively the consideration for the billy the intention of the new rules was to obligatile defeads antito set out on the record the transactions which he intenda to relycon in evidence, in boder to show that the plaintiff had no right to recover co as to git him, by the matter set out in the plea, real hetics of what the objection is; and for estample, that it was an Me commodation: bill; or given for a consideration! white afterwards failed, or oh augumbling transactive in most of these instances primit facis weidelide inautibe given by the defendant, to enable him to call tipos the plaintiffifor an answer by problet of the consideration But the intention of the new rules of pleuding to which I have alluded with taik of a plea of this sort is allowed? visuthat the plaintiff has given no consideration the the bill in for that weight leave the plaintiff in the basis thuse tion as before, subject to the burden of photing 1200 We think that that is a sufficient, svitsmills

Being of opinion that the pleasunglid introduction on apedial demirror, and well abelievel as addes the difference, the question there is, which the defendant, have also which the judy have found for the defendant, have also consider it bad, and well are all of opinion than wheeless not. It is clear that at the trial both particupqueers! liberty to go into evidence with respect to the odulidistration of the billy and we had a adamne that the defendant autilias entitled himself to a very list, later that this billy and we had a consideration in relief that the object of without consideration in relief that the object of pleading the water of object in a consideration, the planticular modes of pleading this water is building adding the water of object is addenation, the planticular modes of pleading this water is building.

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so wortended of that ithe please that it he indefendant inde wieser routing arthurthmethic within distributed and the wind of the contract He and maluador consideration, edidi mounequaltrily sit tod. bill disider beautique bill desided atheres and beautiful and b he lactetal la figible postession of the defendant; y and hthers might be armorahobligation on the defendant n-state direction of forbearing or to said a third person! id vgizing mediti todaristher; all which it was saids reference and in themselves for industing a in bate which could not be said to have been had you blesmid the besteries settinged, abyectes defined and blesses Same are of printing; that other objection to the plea pent he maintained is for in the cases put the defende : mazis both in common and legal, language is bersaid. haypinad the journideration of If a manisonalities when b graditifus anothers by giving this security for him. desiredade the plaintiff to for been to suc a third pertu highe designdent man he said to have (on possess) the asidatation, because he becelves this beautitithat aliel and adultion got if any giving his bill it find if for bearined istande shitt asvisible shout it pasisonit qualle, banisthan geht and amount he fairly said to bette received sounds We think that that is a sufficient enimer to Being of opinion that the plasitoeidal sidt detearing The next branch of the Objection is that a bill of exsheer may be sinderstadily one make to another as as and that such an indortement would be binding thous any comideration at all position in which programment of the true, it might in one schoe ber these contiderations is driving and pecuniary consideral part dive spread if much a shill could be little indication inctions lift could pathy be on the resoluted that there . s some consideration of effection, personal regardudesite promote the party's interest, on something of that plo lo Batmeen relations; hatstral clore and caffection. said he heithe consideration (L) however go furthehi-

Briton Pastenert! Hilary 1835. Easton v. Pratchett.

for I think that though it may be true that a man who gives money to another cannot recover it back by action, yet that if he promises by parol to give money without consideration, no action at law lies against him to recover it. I do not see how the fact that the promise is in writing, not under seal, can make any difference, or give any more right to bring an action than if it were oral. The law makes no distinction between a written promise not under seal, and a promise by word of mouth (a). A bill of exchange is an assignable contract, but between the parties privy in contract, it does not differ from any other parol pro-Can a parol promise to pay or give at a future day be in itself a consideration, so as to found an action. for a default to pay accordingly?

It is true that if a party receiving, by gift, a bill on which others besides the giver are liable, shall recover. its amount from those other parties, the giver cannot recall or recover the gift; but the question whether he has bound himself to pay the bill is very different. As oral and written promises not under seal are alike contracts by parol and of no dissimilar obligation in law, so we think that for the purposes of this argument, a gift of a bill would not be such a consideration as would sustain an action on it against the giver. We are therefore of opinion, that as this plea in effect alleges that no consideration whatever was given for the indorsement of this bill, or had or received by the defendant on that account, it is sufficient after verdict for the defendant on those facts. We cannot therefore disturb the verdict, and this rule must be discharged.

Rule discharged.

⁽a) See per Skynner C. B. in delivering the opinion of the court of er in Rann v. Hughes, 7 T. R. 350, n.

odrounce to trop or the pro-

NIEL MALLET BRITTEN, Administrator of J. SAUN-DERS (a), against DANIEL BRITTEN, PERROT, and -one ode with the attention

ONENANT, by the administrator of Saunders, on It is no dean indenture of lease by Saunders the intestate to fence at law to e three defendants, of certain factories and machi- an indenture ry fixtures, &c., upon the tenements therein menned, which had been used for carrying on the trade party who has become banka macker, and calenderer, for six years and a quarter, rupt, that the unting thirty days, commencing 25 March 1830, at a defendants, the lessees, rtain pent, payable on the usual quarter days. The have perdenture provided, that at the expiration of the term, formed their covenants with e defendants should leave machinery, &c., of equal the assignees Ing., or should pay the difference. Breaches: Non- of the cestui yment of rent, and that although the term has exred the defendants have not delivered up machinery, c. of equal value. Pleas, by Perrott and Watts. t. Non est factum. 2dly. That at the time of the mise, the machinery was held by the intestate Squnre, in trust for D. Britten, the other defendant, and at all the beneficial interest in the premises, with the demachinery, &c. was in D. Britten till he became a akrupt, The plea then averred the proceedings in akruptcy, and the assignment of all the bankrupt's erest, in the premises, with the machinery &c., to W. and B., and that on the expiration of the term, roft and Watts, as two of the defendants, paid the reprint and did yield up to the said W. P. and machinery, &c. upon the demised premises, of value to the machinery, &c. in the declaration entioned; and thereupon they pray judgment. Simier to the first plea. Demurrer to the second, alleg-

an action on

⁽a) " For the use of Jane Brüten, and until she shall duly apply for and in letters of administration of the goods of the said J. S."

BRITTEN v.
BRITTEN.

ing for cause that it improperly offered matter of mere trust and equity as an answer to an action at law; that although there are three defendants, and it offers matter in bar of the action, yet the second plea improperly prays judgment as to two of them only. The Court called on

Erle to support the plea. The defendants have handed over the bankrupt's property to the assignees as the law would have compelled them to do. This is analogous to cases where the bankrupt, having a mere legal estate in trust for others, and also a beneficial interest, the legal estate has been held not to pass to the assignees, but to remain in the bankrupt for the purposes of the trust, while the beneficial interest vests in his assignees. [Lord Lyndhurst C. B. The assignees. are substituted for the cestui que trust, and all his be-Alderson B. neficial interest is transferred to them. If they the defendants had not paid the assignees, they could not have brought the action. Lord Lyndhures C. B. The assignees might have compelled the lessor to sue for their benefit in his name.] Scott v. Surman, (a) and Winch v. Keeley (b), show that courts of law will take notice of equitable rights. The lesser has brought the action without the consent of the ssignees. [Lord Lyndhurst C. B. That is at law orrect; the defendants have their remedy in equity-The accurate administration of justice in both tribunals requires that their jurisdictions should be kept parate(c).] But though these defendants may not be able to enforce the rights of the cestui que trus, 25 plaintiffs in an action, they only here seek shelter under those of the assignees. In Carvalho v. Burs Littledale J., says, "It is quite clear that the ssign-

⁽a) Willes, 400.

⁽b) 1 T. B. 619.

⁽c) See Bauerman v. Radenius, 7 T. R. 663.

⁽d) 4 B. & Ad 393.

ment vested in the assignees all the personal estate

and effects in which the bankrupt was, at the time of the bankruptcy, beneficially interested with the statutox y exceptions 6 Geo. 4. c. 16. ss. 81, 82. 86. 112, but as the object of the assignment of the bankrupt's property is that it may be applied to the payment of his

1834. BRITTEN BRITTEN.

debts, it is equally clear that nothing passed by it, which the bankrupt then held in trust for others, or in which he had only a mere legal interest." He goes on to show that if, at the time of the bankruptcy, the bankrupt possessed a possibility of interest from which a benefit to his creditors might result, the whole would pass by the assignment, and cites Scott v. Surman, Winch v. Keeley, Carpenter v. Marnel(a), and Gladstone v. Hadwen (b). The assignees having taken possession of the property, the common law acknowledges their right, and the defendants cannot be called on to pay damages for handing over the bankrupt's property to them. A court of common law will take notice of legal and equitable rights, and if they can distinguish rights, they can recognize duties arising from them. [Bolland B. In Gerrard v. Aylmer(c), the defendant A., being indebted to C., a bankrupt, the defendant and the bankrupt became bound to M. L for the money, in trust for the bankrupt; a commission then issued, and this debt was assigned to the plaintiff, a creditor; M. L. died, and his executor released the debt; it was held, that the interest of the bankrupt was transferred to the creditor by the statute, and that the release was no bar to an action of debt by him.] That shows that the Court will take notice of the beneficial interest. So, where goods had been sold by a factor, on credit, the beneficial interest of the principal in the price, prevailed against the legal (a) 3 B. & P. 40. (b) 1 M. & S. 517.

[/]al Palm KOK

BRITTEN v.
BRITTEN.

interest of a bond creditor who claimed the price: the factor's assets; Burdett v. Willett (a). [Los Lyndhurst C. B. Does the statute enable the assines to do more than the party beneficially entitled cestui que trust might have done? He might assighis interest. Does that make a difference as to the party who is to sue? The legal estate is still in D. Britten, and an action would lie in his name.] [Part B. Does the bankruptcy make any difference in law Your argument is, that the plaintiff is trustee for or of the defendants, viz. the bankrupt; can the act of more than vest the trusts in the assignees, so as make them hold for the creditors what was held before by the cestui que trust?]

It vested a right in the assignees which might have been enforced by them against the defendants, under the bankrupt act. [Lord Lyndhurst C. B. Direct they brought an action you might have filed a bill f an injunction.] Trusts were noticed in Allen v. I pett(b), where the assignees recovered from the trustees, under a marriage settlement, dividends where they had covenanted to permit the bankrupt to ceive. [Lord Lyndhurst C. B. No doubt we may trusts—that is, we know what they mean, and that beneficial interest differs from the legal.]

Mansel was to have supported the demurrer.

Lord LYNDHURST C. B.—We have no dot the subject. We must decide here a point of I cording to the rules of a court of law. If the d lead to hardship, the defendants may apply to of equity, where, if the application is in time, t have a remedy. We constantly take notice trust is. Here the assignees are substituted cestui que trust, that is, by the operation of the statute 6 Geo. 4. c. 16. In Gerrard v. Aylmer, cited by my brother Bolland, the action was not on the bond, but on the debt for which the bond was given.

BRITTEN v.
BRITTEN.

Parke B.—The only case which applies is that in Palmer, and that is distinguishable. The bond was there given to secure a debt, not as an extinguishment of it; and though the bond was extinguished by a release, the court held that the debt was not. No assignment took place at that period of the bankrupt laws, but the commissioners divided the goods among the creditors.

The rest of the court concurred.

Judgment for the plaintiff.

Knowles against Lynch.

Court for 60l. of which 20l. had been levied; the remove a judyment from an defendant was not to be found within the jurisdiction inferior court, of that court, and had no more effects there, but he had other goods at Hull.

Comyn moved for a certiorari to remove the judgment into this court, that the plaintiff might issue execution for the remainder of the debt, pursuant to 19
levied by process from the inferior court.
in express terms, where part of the damages have been
levied.

The court will remove a judgment from an inferior court, in order to issue execution thereon pursuant to 19 Geo. 3. c. 70. s. 4. though part of the debt has been levied by process from the inferior court.

Lord LYNDHURST C. B.—The preamble of the section seems to contemplate courts whose jurisdiction is only to the amount of 10*l*.

1834. Knowles T. LYNCH.

It being certified that such interference was as to judgments in the Palace Court, and that the practice of the King's Bench, the Court gr

Rule absolute in the first in

ANNE BYNE and CATHERINE CANN LIPPIN Infant, by her next friend, Anne Byne, ag W. Currey, and Others.

Where a testator in his will directs that one class of legacies "shall be paid prior to his debts and other legacies, and that all his legacies shall be paid within two years, free from legacy duty," the exemption from duty is not limited to such legacies only within two years, but the general words all my lega-cies," will in-clude a legacy given by a subsequent codicil, which is made payable at a different time.

SIR HENRY CANN LIPPINCOTT dated 20 July 1822, duly executed to 1 estates, bequeathed, among others, pecuniary to the Glocester, Bristol, and Bath Infirmal then gave the following directions, "which thr table legacies I direct may be paid out of my estate, prior to the payment of my debts, and t legacies hereby by me given and bequeathed. all my legacies to be paid within two years : decease, free of any deduction for tax or duty wise howsoever, and that such of my said les shall not be paid within that period shall carry as are payable at 41. per cent. from the expiration of the years.

> The testator then gave certain freehold as hold estates, particularly described, and all sonal estate, to trustees, whom he also made h tors, upon trust to convert the personalty int and to sell, with certain exceptions, the freel leasehold estates; he then directed that the should stand possessed of the monies so arising trust to pay his debts, and funeral and test expenses, and the several legacies thereinbefor given," (except the charitable legacies which paid out of the personal estate only,) and if ins

the deficiency to be raised by mortgage of any part of his freehold lands.

BYNE and Others v.
CURREY and Others.

On 25 May 1825, the testator, by a codicil, gave 1000l. to A. B., to be "paid immediately" after his death. In July 1829 he made another codicil, containing the following bequest:—" I give to Catherine Cann Lippincott, the daughter of the said A. B., born 16 December 1828, and baptised in the parish of St. Marylebone, the 22 January 1829, residing with me, the sum of 5000l., raiseable immediately after my decease; and in case my personal estate shall be insufficient to pay the above legacies, after payment of my debts, and the legacies given by my will, I charge the same on my real estates." Then followed directions about her education, and, in conclusion, "In all other respects I ratify and confirm my said will."

The case originally came on before Lord Lyndhurst, sitting in equity, who reserved a question, by the special case, for the opinion of the full Court, whether the legacy of 5000l. bequeathed by the second codicil was given free from the legacy duty.

Jervis and Rolfe for the legatee. To charge the real estate it must be shown, first, that the testator intended to include all legacies by the generality of the charge; and, secondly, that the charge of legacies on land by an attested will is sufficient to charge legacies given by an unattested codicil, and that enough has been done, according to the statute of frauds, to include the codicil.

"A codicil is always considered as part of the will, and the intent of the testator is to be drawn from the whole;" Thurlow C., in Hill v. Chapman(a). Where there is a substitution or addition of legacies, and no times are appointed, or funds assigned, they are to be paid out of the same property, and on the same terms

BYNE and Others v.
CURREY and Others.

as those in lieu of which they are given; Leacroft v. Maynard(a), Crowder v. Clowes(b) Roper on Legacies (c). As to legacy duty being paid; when a testator gave 4000l. to trustees, in trust for a daughter till she came of age, the duty to be paid by his executors out of the residue, and afterwards, by codicil, revoked the gift of 4000l., and raised it successively to 50001. and 60001. upon the same trusts, being "desirous of increasing the same;" it was held, not a revocation but a substitution, and the 6000l. therefore was exempt from the legacy duty; Cooper v. Day (d). [Lord Lyndhurst C. B. That was decided expressly on the ground of substitution. If the legacies had been cumulative, the second would be liable to duty.] If by the will the real estate has been charged with the payment of the legacies in general, the words will take in the legacies in the codicil, Masters v. Masters(e), even where the codicil is not properly attested,__ Brudenell v. Broughton (f), nor duly executed, for it is still part of the will. See per Lord Hardwicke, Hannian v. Packer(g), Jackson v. Jackson(h). [Lord Lyndhurs... C. B. By the second instrument in Jackson v. Jackson the land was devised in trust for the nephew, subject to such "legacies as were thereinafter given," and the the legacies were given. These cases would apply the testator had said, I direct all my legacies to be paid within two years after my death, without legacy duty. If a testator charges legacies generally, on bis real estate, and afterwards, by a codicil, gives legacies, they are, no doubt, within the charge. But here is material distinction between the will and the codicil By the will all the legacies are to be paid within two

⁽a) 1 Ves. jun. 279; 3 Bro. C. C. 233, S. C.

⁽b) 2 Ves. jnn. 449.

⁽c) Vol. I. 760.

⁽d) 3 Mer. 154.

⁽e) 1 Peere Wms. 423.

⁽f) 2 Atk. 268.

⁽g) Amb. 556.

⁽h) 2 Cox, Ch. Cas. 35.

sars, by the codicil, immediately. Parke B. In ses where the legacies are to be paid within two sars, two and a half per cent. duty is payable; in the >dicil, ten per cent.] The time when the legacies are be paid does not interfere with the direction that should be paid free from legacy duty. gacy in the will is to be paid within, not at the expiation of, two years after testator's death. The exeutor may find it convenient, but is not bound to postone payment for that time, and in the codicil the noney is to be "raiseable" immediately, but it may not raised. [Lord Lyndhurst C. B. But it shall vest mmediately, and a fund must be raised, because her ducation is to be provided for. Her share would be able to abate proportionably with the others, notwithanding the different periods of payment. [Parke B. he postponement for two years may be part of the usideration of the legacy being paid without the ley duty, how can you say that that which is to be immediately is within the same reason? making money for two years, for the benefit of residue, may be the reason for no duty being pay-If nothing had been said about "raiseable imtely," the condition would apply to the legacy in odicil. [Lord Lyndhurst C. B. There is one enproposition in the will to pay the legacy, and with-Luty. In the codicil the proposition is distinct. can the court safely come to the conclusion that gacy which is to be raised immediately, is to be dered in the same light as a legacy which is to be in two years?] The legacies are payable within ears, but it was competent for the executors to any moment. [Lord Lyndhurst C. B. The leould not claim.] If the interest accruing had e reason, the testator would have made them "after," not "within" two years, else the party will would be in a better situation than by

BYNE and Others v.
CURREY and Others.

BYNE and Others v.
CURREY and Others.

the codicil; but the testator could not intend that the infant, who was his natural daughter, should be worse off than the others, Charteris v. Young (a). [Lord Lyndhurst C. B. There a legacy to the husband, after one to the wife had lapsed by her death, was not a substitution in the sense in which it is used in cases of this kind. It was decided to be a substantive bequest.] By the will, which gave a legacy to testator's daughter, Mrs. Young, he directed that all the legacies "thereinbefore bequeathed," should be paid free of duty, but the legacy to the husband was by a subsequent codicil.

Simpkinson and Koe for the executors. The question is as to the testator's intention; this is to be collected from the will and codicil taken together. It is not disputed that where a testator duly charges hisreal estate with legacies, he may by an unattested codicil add to them; and that such added or substitute legacy must partake of the nature of that for which to which it is added. In Jackson v. Jackson (b), after giving several legacies, the testator devised his reestates &c. subject to the said "thereinbefore me tioned annuities and legacies;" which Buller J. held to be equivalent to a general charge of legacies. that decision is not justified by any authorities, and is at variance with some. Masters v. Masters (c) is strong against it, where the words "above mentioned" in the will are held not to include legacies in the codicil. Charteris v. Young, the expression "hereinbefore given," was held not to apply to a subsequent instrument. Where there was a devise of a term to trustees to levy a sum for the payment of legacies " there by given," and "several legacies hereinafter bequeathed,"

⁽a) 6 Madd. S0; 2 Russ. 183.

⁽b) 2 Coz's Ch. Ca. 35.

⁽c) 1 P. Wms. 421.

and a codicil unattested gave a provision to some legatees in addition "to their said legacies," the latter legacies were held not chargeable on their real estate; Bonner v. Bonner (a). [Lord Lyndhurst C. B. If the words had been "all my legacies free of legacy duty," it would have applied to the codicil. The ground of the decision was, that it was not a general charge of legacies.] So where the terms as well as the amount of a legacy are made to vary in the codicil, Burrows v. Cotterell(b). There by the will an annuity free from duty was given to A. and B., and after the death of the survivor, over to C.; by the codicil this was revoked, and an annuity of a less sum given, without mentioning the gift over to C. A distinction is made in the will between the charity and other legacies; the charity legacies are not only to be paid in preference to his other legacies, but even before his debts, and are not to wait for the end of two years. The proper construction is, that the charity legacies should be paid immediately, not without the legacy duty; that the legacies which are postponed to the end of two years should be free from duty. The charge therefore is not general, but only on legacies payable at the end of two years. [Lord Lyndhurst C. B. It is a difficult position to say that the charity legacies are not included within "all my legacies." The legacies are not payable till two years, because the interest is not to run till then; it is not so with the charity legacies. [Lord Lyndhurst C. B. The charity legacies are to be paid immediately; then comes the clause " all my legacies to be paid within two years;" then "free from duty;" that is, "all my legacies free from duty." In that case "all my legacies" would bear interest from two years, which is not consistent with the provision for the immediate payment of the charity legacies.] Those lega-

BYNE and Others v.
CURRET and Others.

BYNE and Others

CURREY and Others.

cies are not demandable till after two years, which are to be paid out of the real estate. The interest being only in default of payment can only run from the time when the principal is due. [Lord Lyndhurst C. B. You say that "all legacies" means only the legacies given by the will, because those only are charged in the real estate.]

Jervis in reply. If the only words had been "all my legacies," it being a general charge would have included after-given legacies. The introduction of the provision "to be paid within two years," does not restrict the general sense of the preceding words to legacies of that class, because without doubt the charity legacies, which are to be paid forthwith, are within the exemption in the will. Bonner v. Bonner (a), which wa cited in opposition to Jackson v. Jackson (b), was the case of an additional legacy, and was not to be paid or of the same fund.

Lord Lyndhurst C. B—I am of opinion that the duty is not payable in respect of this legacy. It is said that as the legacies given by the will to individuals are not payable till the expiration of two years, but the legacy in question is raiseable immediately, it is on a different footing, and not within the words of exemption. That makes it necessary to look to the will. there are two classes of legacies, to charitable establishments and to individuals. The testator meant that the first should be paid immediately, for he directs them to be paid before his debts; after that he directs all his legacies to be paid within two years, by which I understand the legacies to charitable institutions due as soon as they can be paid, and all the legacions are due in two years. These are all to be without

⁽a) 13 Ves. jun. 379.

⁽b) 2 Cox's Ch. Ca. 35.

y, comprehending the charitable legacies; even those scies which are payable immediately are to be free; refore there is no reason that legacies payable by icil, though raiseable immediately, should not have n intended by him to be given free from legacy y.

1834. BYNE and Others Ð. CURREY and Others.

PARKE B.—At first it appeared to me that the postement of payment of the legacies, and their being : from duty, formed a connected proposition: and it urred to me that the postponement of payment for years was the consideration for the non-payment the duty, and that when the codicil said the legacy n given was to be "immediately paid," it was not ended that it should be so paid without the duty, zause that consideration failed. But in the course of : argument I have come to the conclusion that we y read the will and codicil as consisting of two dissitions:—The first provides that some of the legacies all be payable within two years, and the charitable gacies immediately; the second directs that "all" his gacies should be paid free of duty. The charity lescies come within the general description, and the lemy given by the codicil is on the same footing as ese, and therefore in the same manner should be empt from duty.

BOLLAND and GURNEY Bs. concurred.

Burn against Morris.

A clerk of the a lost bank-ROVER for a bank note for 201. plaintiff had lost the note in the street; it had note, which the en picked up by a woman; the defendant's son took tortiously conto the Bank of England to be changed, and brought verted to his

Trover lies for defendant has own use,

ough part of the proceeds has been paid by him to the plaintiff. The acceptance Part does not affirm the taking, so as to waive the tort, but the amount received in go in reduction of damages. BURN v.
MOBRIS.

the proceeds to the woman, who then gave him two sovereigns. The woman was afterwards taken before the lord mayor, and seven sovereigns, which were found upon her, were restored to the clerk as part of the proceeds. At the last London sittings before Bolland B. the jury thought that the son was agent to his father the defendant, and found a verdict for the plaintiff, damages 13l. The learned judge having reserved leave to move to enter a nonsuit,

Bompas Serjt. now moved. Trover does not lie for the whole note, after the clerk had received 71. as part of its proceeds: for the party must either affirm or disaffirm the whole transaction. Taking the change was affirming the act, and the plaintiff cannot now say that it is wrongful. As where a sheriff sells property of bankrupt, the assignees of a bankrupt have a right treat him as a wrong-doer; but if they claim the produce they affirm the sale, and cannot turn round and say it was wrongful; Brewer v. Sparrow (a).

Lord LYNDHURST C. B.—In that case the whole proceeds of the sale were taken; that is an adoption of the act; here the receipt of the 7l. does not ratify the act of the parties, it only goes in diminution of damages.

VAUGHAN B.—Property in the note was proved a conversion, and there was no waiver of the tort.

Rule refused -

(a) 7 B, & C. 310.

1834.

HATSALL against GRIFFITH.

THIS was an action of assumpsit to recover the value A broker was of twenty-one sixty-fourth parts of the brig Rhoda, sell a ship beof which the plaintiff was part-owner with two others, longing to Brown and Prothero, who were living at Bristol. The owners, two of defendant was employed as broker to sell the ship, whom com-Prothero and Brown communicating with him on the with him on subject. The plaintiff's share after the sale being to them he admitted, in letters from the defendant, to be 3401, paid their the plaintiff desired him to pay over that sum to his proceeds of bankers in London, which he refused to do without the the sale, but consent of the other two part-owners, though he had ting the aalready paid them their shares. At the trial at the mount of the third part-London sittings in this term the plaintiff was nonsuited. owner's share

D. Pollock now moved to set aside the nonsuit and to pay it to enter a verdict for the plaintiff. Every part-owner the consent of may sell his share of a vessel at any time without the the other two. An action of consent of any other. When the amount of his share assumpsit is ascertained or is capable of being separated, it having been brought by the becomes his undivided share, and he may sue for it. third part-It is true that in an action to recover freight, all the share: Held, part-owners must join, because all are partners with that he was respect to the concerns of the ship (a), but that is not recover. in respect of the ownership (b); and even in case of freight, it is added, "unless perhaps some one should have received his own share or have released his claim to it." [Lord Lyndhurst C. B. There is no doubt about the right to sue separately under certain circumstances; but the question here is, whether the contract to sell was made by the defendant with all the

employed to the subject. shares of the after admitto be in his hands, refused him without

⁽a) Abbott on Shipping, 3d edit. 98.

⁽b) 1 Phil. Evid. 391; 1 Stark. Evid. 2d edit. 210.

HATSALL U. GRIFFITH.

owners jointly, for if it was, all should have sued. Parke B. Was he employed by all jointly to sell the ship as one thing for all, or by each to sell the share of each? Lord Lyndhurst C. B. Suppose there are three joint owners, of whom one is the manager, and that all agree to sell, but the managing owner employs the broker to sell the ship generally, is he not employed for all?] When the legal interest is severed each may sue; and it is said in a text-book (a) that, "in case of a joint interest, if two out of three parties have been paid their shares, the third may, in respect of such severance, sue alone for his proportion, for which Sedgworth v. Overend (b) and Garret v. Taylor(c) are cited. Here, the defendant's letters show

- (a) 1 Chitty Plead. 7; 4th edit. 6.
- (b) 7 T. R. 279. This was an action in tort, viz. on the case by opart-owner, brought after the other two had in an action of trespass covered damages for running down their ship.
- (c) 1 Esp. Treat. on Nisi Prius, 117. "Three persons had employed the defendant to sell timber for them, in which they were jointly concerned: to two he paid their exact proportion, and they had given him a receipt in full of all demands; the third now brought his action for the remainder, being his share; it was objected that, as this was a joint employment by three, one alone could not bring his action:" but Lord Mansfield is reported to have ruled, that when there had been a severance as above stated, one alone This case seems contradicted by all the other authorities, unless at the time of making the agreement the parties had a several is terest, and the promise was made to them severally as well as jointly. As when a man covenants with two or more jointly, yet, if the interest and the cause of action of the covenantees be several and not joint, the covenantees shall be taken to be several, and each of the covenantees may bing an action for his particular damage, notwithstanding the words of covenant are joint; Eccleston v. Clipsham, 1 Saund. Rep. 154, n. (1) (a); and cases there cited. Also Petris v. Bury, 3 B. & C. 353; Ref Poulton, 2 B. & Adol. 822. The rule is laid down in Cabell v. Vergt 1 Saund. 291, h.n. (4), with respect to parties suing on contracts not w seal, whether in writing or by parol. " A distinction has been take tween actions of assumpsit and actions of tort; in the former case, only of several persons who ought to join, bring the action, the def may take advantage of it on non-assumpsit, but in the latter he mer

1834.

the sale of the other shares, and he has taken on himself to sever the plaintiff's share from the rest and keep that only. [Parke B. Suppose the defendant's commission had not been paid, or that the money had not been paid over, must the defendant have sued, for his commission, the owners all jointly or each separately? or suppose that the purchaser, without any default of the broker. had not paid the price of the ship, it cannot be argued that the defendant would be entitled to a per centage from each owner on their respective shares. Against whom could he have proved, had a bankruptcy intervened? There was a case of Break v. Douglas (a), in the King's Bench, a short time ago, in which one who had a joint interest in a ship, sought to recover, in an action of assumpsit, from an insurance broker a sum received by him from the underwriters. The court held that the part-owner was entitled to recover from the broker. I differed from them, as I thought it was a joint employment, and the remedy joint by all the owners against him, and by him against them all. so that if either had been insolvent the other remained liable. but the decision turned on some circumstances which, the rest of the court thought, made him a separate agent for each owner.] [Lord Lyndhurst C. B. What fact is there here to lead to the conclusion, that it was intended to be a separate contract by the present plaintiff to employ the defendant, and by him to sell the ship for the plaintiff and not for the other partowners? The parties might all agree to sell, and to employ one to sell the whole when the entirety of the ship would sell most advantageously. [Parke B. That would show them all to have employed the defendant

it in abatement. And this distinction is universally adopted." See cases cited ibid. Jell v. Douglas, 4 B. & Ald. 374; also Webber v. Tivill, 2 Saund. 121 c.; Garrett v. Handley, 3 B. & C. 462.

⁽a) Not yet reported.



without their consent. Prothero and Bro
the owners who communicated with him on
ject of selling the ship, the defendant paid
amount of the two shares to them, and for
security refused to pay the other third to the
without their consent.

PARKE B.—On this statement there wa hiring of the defendant to sell the whole would have been a breach of his instruction if he had paid over to one his share of the money without the special concurrence of the

ALDERSON B.—It appears, that the wan concurrence of all the owners, was the groun defendant's refusal to pay.

Rule 1

1834.

JANE KIRWAN, Administratrix of Antony KIRWAN, against CLEMENT KIRWAN, MATTHEW KIRWAN, and NICHOLAS TUITE KIRWAN.

A SSUMPSIT. The declaration contained counts Mere knowfor money lent, for interest and money due upon ledge by a crean account stated, laying the promises and the state-dissolution of ment of the account after as well as before the death of partnership, the intestate. Nicholas T. Kirwan suffered judgment the old partby default, and the other two defendants respectively ners from their liability to pleaded the general issue, and as to so much of the him, though he declaration as laid the debt in the life-time of the in- account with testate, the statute of limitations, and a set off. the trial before the lord chief baron at the sittings pears expressly after Hilary term 1831, a verdict was found for or by some act to have acthe plaintiff, subject to the following case: -In 1798 cepted the sub-John Kirwan, the father of the defendants, entered of the new into a partnership with the defendants Clement and partnership Matthew, as West India merchants in London, under retiring partthe firm of John Kirwan and Sons. The partnership ners. C. M. and N., tradcontinued until the death of the said John Kirwan, ing under the which happened about 1799. Upon his death, the name of J. K. and Sons, were business of the house was continued under the same indebted to A. style and firm by the defendants Clement and Matthew the partneruntil 1802, when the other defendant, Nicholas Tuite ship, and M. Kirwan, was taken into the firm, which continued to took to liquicarry on business under the same style and firm of date the concerns. After-John Kirwan and Sons, until the retirement of the wards N. went defendant Clement in June 1824. The intestate An- out of the business, and on his retirement a new partner was taken in. At that time a notice of the previous

ditor of the will not release continue his At the new firm. unless he apinstead of the dissolution of partnership was advertised in the Gazette, but there was no proof that the plaintiff ever saw that advertisement. No notice was given of the introduction of the new partner; the business was carried on in the old style of J. K. and Sons, and the plaintiff continued his account with them under that name. About eleven months after the dissolution, in a letter to one of the partners who had

retired, plaintiff said he was aware that after the dissolution he had no claim against him, "but there was nothing to show that he accepted the substituted credit of the new partner in his stead:" Held, that the three original partners to



yearry to the order or cach intercenting a entitled Mr. Antony Kirwan, jun. in account w Kirwan and Sons. In each of these accounts t tate was credited with the balance appearing du from the statements of accounts of the precedir and after the death of the intestate the accou rendered to the plaintiff, the widow, by the tl of John Kirwan and Sons; the account in 1 1829 was in the hand-writing of Nicholas Tuite and stated a balance to be due of 92881. 4s. this sum the action was brought. Clement retired from the partnership in Jun and defendant Matthew Kirwan on 31st Dec the same year, but no public notice of the di was given untill 11th January 1825, when the I advertisements were published in the Gazette:

"The partnership hitherto carried on by undersigned Clement Kirwan, Matthew Kiru Nicholas Kirwan, under the firm of John Kir Sons, was this day dissolved by mutual conser as concerns the above-mentioned Clement, who leaving the undersigned Matthew and Nich carry on the business and liquidate the concern present partnership. Witness our hands the 3 of June 1824.

"The partnership hitherto carried on by us the unlersigned Matthew Kirwan and Nicholas Kirwan, under
the firm of John Kirwan and Sons, was this day dislevel by mutual consent, the said Matthew Kirwan
tiring therefrom. As witness our hands this 31st day

1 December 1824.

KIRWAN v.

M. Kirwan.

N. Kirwan.

At the time that the defendants Matthew Kirwan and Clement Kirwan retired from the firm of John Kirwan and Sons, the debts due from the firm amounted to the sum of 70,000l., and the debts due to the firm amounted to the sum of 73,000l., besides more which were outstanding and to be collected.

After Matthew and Clement had retired, Nicholas Tuite Kirwan, on 1st January 1825, took his brother-in-law Simon Kelly into the house as partner, the business being still conducted in the name of John Kirwan and Sons. At the time the new partnership was formed there was new capital brought into the concern amounting to the sum of 27,000l. clear of all the old balances.

The account with the intestate Antony Kirwan was carried from the books of the old to the new partnership. The balance was struck annually as before, accounts were rendered to him, and after his death to the plaintiff, his widow. The intestate called at the house for money once or twice a month, and the Plaintiff after his death also called for the same purpose everal times, and received monies on account. On 25th November 1825, the intestate wrote the following letter to the defendant Clement:—

"Dear brother,—I received your letter yesterday:

1834. Kirwan U. Kirwan. I was very well aware that on your dissolving partnership with Mr. Nicholas I had no further claim upon you." The letter to which it refers was not produced in evidence. Administration of the intestate's estate was granted to the plaintiff, and at the time of the commencement of the action the balance due to her as administratrix was 93331, 17s.

The question for the opinion of the court is, whether the plaintiff is entitled to maintain the present action against all the defendants; if she is, the verdict is to stand; if the court should be of opinion that she is not the verdict is to be set aside and a nonsuit entered.

This case was argued in Hilary term 1832, when the court thought it necessary to be informed on the two points hereinafter mentioned, and made a rule for new trial; the case to be considered binding except as to the state of the debts and credits at the time of the dissolution of the partnership, and except as to the knowledge by the intestate, or the administratrix, of Kelly being a partner. Either party to be at liberty to add any facts. The two issues directed by the preceding rule were tried before Bayley B. at the sittings after Trinity term 1832, and in the Michaelmas term following, on the hearing of a rule which had been obtained for a new trial, it was agreed that the following lowing statement should be added to the case: "The there was no evidence of the actual state of the debts and credits of the house at the respective dat of the retirement of Clement and Matthew Kiru A witness who had business transactions with house, stated he never heard of any embarage in the house. The intestate in 1825 knew of the duction of Kelly into the house." The following was given in evidence on the trial, and the court v

Letermine upon the argument, whether it was to be considered part of the special case:—

1834.

KIRWAN

v.

KIRWAN.

"My dear brother, 4th February 1825.

"I have read your letter to Mr. Clement: I sincerely Deepe that he will not withdraw what he has allowed Jou. In your's to brother M. Kirwan you say that you re much distressed: the idea of your being so, very much affected me. I have inclosed you a bank post bill for 201, which you will oblige me in accepting. My dear brother, trust in God and he will help you through your afflictions. I intend to give my landlord notice. Mr. Matthew having retired from business, I do not know where my property may be placed. Matthew will do all he can to get me 51. per cent., if he does not succeed I shall only have four, which will be 110% less, and I intend to purchase a house near town, if I can meet with one to suit us, to reduce our rent. Let me hear from you soon. I shall be glad to know if you have received the inclosed: also if you have heard from Mr. Clement. A. Kirwan."

This case had been argued before on the question whether Nicholas Kirwan and Kelly were liable? The Court now intimated that what they wished to hear squed was, whether Clement had been discharged, and Matthew and Nicholas remained liable?

The case was now argued on this point by

Follett for the plaintiff. The question is, was there efficient proof of the defendants' being discharged from their original liability? [Parke B. A demand either be discharged by payment, or by the transfer of the debt from the old to the new firm.] There is no payment; then is there an agreement to accept the security of the two remaining part-



taken place to discharge them? There is no no accord and satisfaction, and no one is sh substituted for the original parties. First, as there is no evidence to show that he is liablehe become so? It is suggested that on the rendered since he came into partnership, K. be liable on an account stated. Clement we June, and Matthew in December 1824; Kell in January 1825, and an account was render cember in that year. But no act was done w came in, which amounts to accord and satisfact should have been some evidence that the pla discharged the retiring parties, and all partie tiring partners, and Kelly and Nicholas 7 should have concurred, to make it binding. B. The account is transferred in the boo credit of Antony in the debits of the new This is not enough, Devaynes v. Noble (b). counts were not rendered by Kelly, but by partner in the name of John Kirwan and Sc was common to the old and new firms. Bu is not liable, the other two are not discharged was no consideration or better security give tony to release them. [Parke B. The se one may in law be enough consideratio charge two, as it may be better than a join

KIRWAN v.

1834.

mptcy; and any preferable security is a sufficient onsideration. The sole security of a solvent parter is better than the joint security of him and If the solvent one dies you would have remedy against his estate at law; so should the The Court will not presume the advantage of a sole security reless it is distinctly shown; it is necessary to prove a good consideration for the agreement of the plaintiff to accept a new debtor; Goff v. Davis (a), Lodge v. Dicas (b), David v. Ellice (c). [Parke B. There is a case (d) in the King's Bench that throws a doubt upon those. There must still be clear and express proof of agreement between the parties, and it is not to be left to inference. There was no act done when either retired, and plaintiff did not know of the account being transferred, and could not have agreed to discharge the partners. [Lord Lyndhurst C. B. The letter of 4 February 1825, rather negatives an agreement; but considering the date of that, and the death of the person, perhaps no inference should be drawn from that. It is not stated on the case that Antony had notice of the dissolution. Parke B. The defendant uses that as an acknowledgment that that had Passed between the parties which amounted to a discharge. Lord Lyndhurst C. B. There seems to be nothing to affect Kelly—that being so, what is there to how that the defendants are not liable? You must show what is equivalent to payment, or an *Sreement to accept the continuing partners in lieu of the others. Lord Lyndhurst C. B. Assuming that to be so in law, have the defendants made out either of those propositions? the onus probandi lay on them.]

Coleridge Serjt. for the defendants. The jury dis-

⁽a) 4 Price, 200. (b) 3 B. & A. 611. (c) 5 B. & C. 196.

⁽d) Thomson v. Percival, Hilary term, 4 Geo. 4.



tinctly found that the intestate had agreed to take t new firm as his debtor. The creditor of a firm m on good consideration discharge a party going out, take the remaining persons of the firm, Thompson v. P cival (a). Here the liability of the new partner is consideration. Kelly was taken with the concurrence all. On the dissolution of partnership with respect be to Matthew and Clement, the account of Antony v transferred to the new firm, with the cognizance [Lord Lyndhurst C. B. After the partn Kelly. ship was formed, the intestate went as usual to office and received money, but he might not know the change.] There was a statement of the debts a credits at the time of the dissolution of partnersh and the knowledge of Antony's account by Kelly m be inferred, and that he agreed to take the debt him. Suppose Kelly had paid money with his on hand, it would have been presumed that he had know ledge—here is what amounts to that: the account is the books of the new firm, and every act done by the must have reference to their books. If money is paid by firm of which Kelly is a partner, he must be bound I their acts, and must be taken to have knowledge of The letter of February 4, 1825, after the notice of dis lution had appeared in the Gazette, shows a knowled by Antony of the change in the firm. [Lord Lym hurst C. B. He went into the country; though ! received money from time to time, there is no eviden that he knew of the change.]

Follett in reply. The accounts were not render by Kelly, but by the partner who remained. The must be clear evidence of an express agreement change the credit, Cuxon v. Chadley (b), or so

⁽a) K. B. Hilary term, 4 Will. 4.

⁽b) 3 B. & C. 591.

Lecided act, as where the party had drawn bills on the sew firm, David v. Ellice (a); and a mere knowledge of the change is not enough, Heath v. Percival (b).

1834.

KIRWAN

O.

KIRWAN

Lord Lyndhurst C. B.—In this case money was advanced to the three defendants, they are therefore intly liable for it to the plaintiff, unless they show affirmatively sufficient in law to discharge them. We cannot go out of the statements in the special case. that upon it we may conclude that the plaintiff agreed to take two of the partners as his debtors, and to discharge the third, Clement. To support this view two circumstances are relied on; first, that notice of dissolution of partnership had been given, in which it was stated that Matthew and Nicholas undertook to liquidate the partnership debts; but it was not stated that this notice was communicated to Antony. the defendants rely on a letter from the intestate to Clement, of 25 November 1825, in these terms:— "Dear brother, I received your letter yesterday; I was very well aware that on your dissolving partnerthip with Mr. Nicholas I had no further claim upon you." Considering this case as a juryman, that letter does not lead me to the conclusion that Antony agreed to take the two remaining partners as his debtors. Then did he agree to take Nicholas Kirwan and Kelly? Kelly having transferred his account from the books of the old to those of the new firm, it is Fred that Antony might have consented to take them his debtors. But there is nothing which satisfies my mind that he did. As therefore I see nothing which satisfactorily proves a transfer of Antony's debt to the two brothers Matthew and Nicholas, or to Nicholas and Kelly, the original debtors remain liable, and the plaintiff must have judgment.

PARKE B.—The law is clear up to a certain point in

(a) 5 B. & C. 196.

(b) 1 P. Willms. 682.





this case. All the brothers being originally liable, t are to discharge themselves either by payment, or transfer of their liability by consent of all parties, or the retiring partner having agreed with the plain to substitute the liability of the continuing parts for that of the old firm. We must see if there is thing to support the suggestion of payment or of s stitution. The facts relied on to support the opin that a substitution of credit took place, are, first, advertisement of the dissolution of partnership, a that Matthew and Nicholas were to liquidate the a cerns of the partnership. Secondly, the letter 25th November 1825, from Antony to Clement. agreement was, that Clement should retire, leaving Matthew and Nicholas to carry on the business an liquidate the concerns of the partnership. would have decided whether, in pursuance of the dut so cast on them by the agreement, Matthew an Nicholas had not made some arrangement with the plaintiff to accept a substitution. But it is not state that the dissolution of partnership was known to th plaintiff, and the notice of one partner going or of a firm does not discharge him, unless that notice i proved to have reached the plaintiff. As to the lette it is so ambiguous that I cannot come satisfactorily! the conclusion that the plaintiff accepted the liability of Matthew and Clement only. I concur with my br thers in saying, that on the facts found by the speci case we are bound to decide that the defendants have not made out their case. As to any discharge by pa ment, the case is deficient in any statement from whi a settlement of account on Clement going out of t firm can be presumed. As for an agreement by whi the liability of Matthew and Nicholas alone should substituted for theirs jointly with Clement, there w evidence upon which a jury might have been satisfi of that fact, and if they had found it to be so, I should not have said they were wrong; but as I think it doubtful, and my two brothers have a strong opinion, I shall concur with them.

KIRWAN

V.

KIRWAN

Bolland B.—My judgment is on the facts as stated in the case before me. There appears to have been an agreement, under which the defendants were originally liable to Antony when he lent the money. The house having existed for some years, Clement retired, and then Matthew; on balancing the accounts when Matthew withdrew, the house was solvent, with a surplus of 3000l. At that time a partnership was formed with Kelly, he brought into the firm a capital of 27,000l., and might have looked for some adequate capital from Kirwan. There is nothing to show that he undertook to answer for the debts owing by the old firm, and the probability is, that he would not incur such a responsibility.

Entries might have been made in the books by which Kelly might have protected himself. It is quite uncertain from the words of the case what was the nature of the transfer of the accounts. The account was carried from the old to the new firm, but it is not stated how. Even suppose Kelly had taken upon himself a part of the debt, still there is an absence of Antony's consent, and the parties in the new firm would not be liable.

GURNEY B. had gone to chambers.

Judgment for plaintiff (a).

(a) In this case the parties had agreed that the court should decide on the matters of fact set out in the special case, as well as on the matters of law.

END OF EASTER TERM.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURTS OF EXCHEQUER OF PLEAS

AND

EXCHEQUER CHAMBER,

Trinity Term,

IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.

1834.

Bright against Walker.

The plaintiff, assignee of a lease granted for lives by a bishop in right of his see, used a way, without interruption, to and from his premises for more than twenty years over the locus in quo called the Acre. The of the Acre by assignment

ASE. The first count stated, that before the comme mitting the grievance &c. the defendant was, and from thence hitherto hath been, and still is, lawfully possessed of a certain wharf, close and premises situate &c., and by reason thereof during all the time aforesaid ought to have had, and still of right ought to have a certain way from and out of the same, interthrough, and along a certain close, and from then into, through, and along a certain road or way unto and into a certain common king's highway, and so defendant, who from thence back again. It then proceeded to state was possessed obstructions by the defendant, by erecting gates in and

of a similar lease of it, obstructed the way. In an action on the case for this obstruction, Held, first, that since 2 & 3 W.4. c. 71. the above user conferred no title as against the reversioner, the bishop; nor, secondly, against his lessee, or persons claiming under such lessee during the term.

A declaration claiming a right of way "by reason of" the possession of certain premises, is supported by proof of a reservation of the way in a conveyance of them granted by a tenant for life to the plaintiff.

across the way claimed. Plea: general issue. At the trial before Gurney B. at the summer assizes for Worcestershire in 1833, the following appeared to be the facts of the case:-The road claimed led from the plaintiff's house and wharf in Cliff meadow through Eacham meadow over the locus in quo called the Acre into the public highway. Cliff and Eacham or Achum meadows and the Acre piece were held on leases for three lives under the see of Worcester. In 1809 one Roberts having bought the lease of Cliff and Eacham meadows, built the house now occupied by the plaintiff at the south end of the former meadow near the Severn, together with a wharf and brick-kiln. Having a right of occupation way over the Acre to go to Eacham meadow he made an opening from the latter into Cliff meadow, and carried bricks over both fields and over the Acre, by the occupation way in question, into the highway. The previous way into Cliff meadow was higher up the river, at a place called Grinley style. In 1811 the proprietor of the Acre put up a gate to interrupt the carriage of the bricks. Roberts, however, broke it down, and for more than twenty years the way over the Acre was used without further interruption by him and his successor in the occupation of the house and wharf. In 1816, he sold his interest in both meadows, conveying Cliff meadow with the house and wharf to the plaintiff, and reserving in that conveyance a right of road from the brick-works across Cliff and Eacham meadows into the locus in quo, Eacham meadow being then sold to another person. In 1832 the lease of the Acre having passed into the defendant's hands, he put up a locked gate across the road, for which obstruction this action was brought. The jury found that there had been no grant of the way by the bishop, and that the plaintiff and Roberts had enjoyed the way for more than twenty years withBRIGHT v.
WALKER,

BRIGHT v.
WALKER.

out interruption. Verdict for the plaintiff for damages, subject to a motion to enter a nonsuit, the ground that the use of the way for more that twenty years over lands held by leases for lives count, even under 2 & 3 W. 4. c. 71. s. 2., conferright to it against the church in reversion (a). The learned baron gave leave to move for a nonsuit, and

In Michaelmas term Richards for the defendant, obtained a rule accordingly. [Bayley B. All the land being held under leases for lives, would not a grant by the termor confer a right during the continuance of the lease, even against the bishop?]

Ludlow Serjt. and Whateley showed cause in Easter term before Parke, Bolland, Alderson, and Gurney Bs. The question whether since stat. 2 & 3 W. 4. c.71. the bishop, as reversioner, can, when he regains possession, be barred by his tenant's acquiescence in the use of this way, does not now arise. The bishop's lease not being shown to have expired, his termor is bound by the uninterrupted user. Nor under stat. 2 and 3 W. 4. c. 71. s. 2. is it any answer to uninterrupted user to show the origin of the way to have been more than twenty years ago. By sect. 5. of that statute, if the defendant intends to rely on any cause or matter of factor of law, not inconsistent with the simple fact of enjoyment, it should be specially pleaded.

(a) Another point was raised by the defendant, that the way was claimed in the declaration as appurtenant to the plaintiff's house and what, whereas it appeared to exist by grant of Roberts, which was not set forth. Wright v. Rattray, 1 East, 377, 381: and Kooystra v. Lucas, 5 B. & Akl. 830, were cited; but on showing cause Parke B. said, that the way might be claimed as appurtenant at the time of which the declaration complained, viz. during the plaintiff's possession of the land under the lease, by reason of that possession, and that the declaration was sufficient. And see Coryton v. Lithebye, 2 Saund. 112, 115; Barlow v. Rhodes, ante, Vol. III. 280; Whalley v. Thompson, 1 B. & P. 371.

BRIGHT
v.
WALKER.

1834.

R. V. Richards in support of the rule. lands, in respect of which this way is claimed, being leasehold for lives held under the see of Worcester, it is clear that before the late statute no user would have created a right against the ecclesiastical reversioner. [Parke B. It might against the lessees.] The defendant claims under the lessees of the bishop. Before the late act, user of a way, even by the public, for more than twenty years, if taking place during the occupation of a tenant, was held not to affect the rights of even hy reversioner; Woodv. Veal (a), Daniel v. North (b). In Runcorn v. Doe in Error (c) Lord Tenterden laid it down, that adverse possession is not in general evidence against an ecclesiastical person, unless against the same person who has submitted to that possession. In Barker v. Richardson (d) windows looking over land then glebe had existed without interruption for more than twenty years during the life of one incumbent; but it was held, that as he being only tenant for life without seisin of the inheritance, could not grant an easement; the long enjoyment conferred no right of action for stopping up the windows. In Wall v. Nixon (e) evidence of user for twenty years of a head stock to pen up a rivulet was held no sufficient evidence of a grant to warrant its continuance, to the injury of church land. Then the statute has not altered the previous law; for the plaintiff not claiming right to this way, except by user during all this period, should have shown that the lease from the bishop had continued to exist.

[Parke B. The question upon the recent statute is of considerable importance, we will therefore take time to consider it.]

VOL. IV.

LL

⁽a) 5 B. & Ald. 454.

⁽b) 11 East, 372.

⁽e) 5 B. & Cr. 696.

⁽d) 4 B. & Ald. 579.

⁽e) 3 Smith's R. 316.

BRIGHT

v.

WALKER.

Afterwards, in this term, the judgment of the court was delivered by

PARKE B.—This was an action on the case for obstructing a way to the plaintiff's wharf, which was tried before my brother Gurney at the last summer assizes at Worcester. A verdict passed for the plaintiff, with liberty to move to enter a nonsuit, on two grounds; first that the plaintiff's title to the right of way was not made out by the evidence; and, secondly, that it was not properly described in the declaration. On showing cause, the second objection was disposed of by the court, and the only point to be now considered is, whether the right of way was established. The wav claimed was from a wharf in a close called Cliff meadow, through Eacham meadow, over the locus in quo called the Acre, where the obstruction took place, into a public highway.

Cliff and Eacham meadows were held under the Bishop of Worcester by a lease for three lives, granted in 1805 to Alderman Davis. In 1809 Roberts purchased the leasehold interest from Davis, and began to make bricks in Cliff meadow, and carried them through Eacham meadow and the Acre into the highway.

In 1811 Dalton, the then occupier of the Acre, and the assignee of a copyhold lease for four lives under the bishop, of the close called the Acre, put up a gate to obstruct Roberts in carrying bricks. Roberts broke it down, and he and the plaintiff, who claimed under him continued to carry bricks over the Acre without interruption for more than twenty years, when defendant claiming as assignee of the bishop's lease under Dalton, obstructed the way, and for that obstruction the action was brought.

No proof was given on either side that either of the riginal leases had been surrendered, and therefore the use must be considered as if both had continued to be time of the obstruction.

BRIGHT v.

The jury found, first, that they would not presume my grant of right of way by the bishop; and secondly, hat the plaintiff and Roberts had actually enjoyed the may without interruption for more than twenty years. Ind the only question is, whether such an enjoyment ives to the plaintiff a right of way over the defendant's lose, so as to enable him to maintain this action? That epends upon the construction of the act 2 & 3 W. 4. 71. and particularly sect. 2.

For a series of years prior to the passing this act, dges had been in the habit, for the furtherance of stice and for the sake of peace, to leave it to juries presume a grant from a long exercise of an incorpoal right, adopting the period of twenty years by alogy to the statute of limitations. Such presumpand did not always proceed on a belief that the thing resumed had actually taken place; but as is properly id by Mr. Starkie, in his excellent Treatise on Evirace, vol. ii. p. 669, "A technical efficacy was given the evidence of possession beyond its simple and naaral force and operation;" and "though in theory it mere presumptive evidence, in practice and effect was a bar." And that learned author observes, in a note, "that so heavy a tax on the consciences and good sense of juries, which they were called on to incur the sake of administering substantial justice, ought to be removed by the assistance of the legislature."

The act in question is intended to accomplish this bject, by shortening in effect the period of prescription, and making that possession a bar or title of itself thich was so before only by the intervention of a jury. The title of the act is, "for shortening the time of pre-

BRIGHT v.
WALKER.

scription in certain cases;" and it recites that "the pression 'time immemorial, or time whereof the men of man runneth not to the contrary,' is now by the of England in many cases considered to include: denote the whole period of time from the reign of k Richard I., whereby the title to matters which h been long enjoyed, is sometimes defeated by she ing the commencement of such enjoyment, which in many cases productive of inconvenience and inj tice." It then proceeds to enact, in the second secti that "no claim which may be lawfully made at common law by custom, prescription, or grant, to: way or other easement, or to any watercourse, or the use of any water to be enjoyed or derived ur over, or from any land or water of our said lord king, his heirs or successors, or being parcel of Duchy of Lancaster, or of the Duchy of Cornwall being the property of any ecclesiastical or lay per or body corporate, when such way or other matte herein last before mentioned shall have been actu enjoyed by any person claiming right thereto, with interruption, for a full period of twenty years, shal defeated or destroyed by showing only that such wa other matter was first enjoyed at any time prior to ! period of twenty years; but, nevertheless, such e may be defeated in any other way by which the san now liable to be defeated; and where such way or o matter as herein last before mentioned shall I been so enjoyed as aforesaid for the full period forty years, the right thereto shall be deemed about and indefeasible, unless it shall appear that the s was enjoyed by some consent or agreement expr given or made for that purpose by deed or writing.

In order to establish a right of way, and to bring case within this section, it must be proved that claimant has enjoyed it for the full period of tw

BRIGHT 10.

sars, and that he has done so "as of right;" for that the form in which by sect. 5. such a claim must be leaded, and the like evidence would have been renaired before this statute to prove a claim by prescripon or non-existing grant. Therefore if the way shall ppear to have been enjoyed by the claimant not penly, and in the manner that a person rightfully ntitled would have used it, but by stealth, as a tresasser would have done; if he shall have occasionally sked the permission of the occupier of the land, no itle would be acquired, because it was not enjoyed 'as of right." For the same reason it would not, if here had been unity of possession during all or part of the time; for then the claimant would not have enoyed "as of right" the "easement," but the soil itself. So it must have been enjoyed "without interruption." Again, such claim may be defeated in any other way by which the same is now liable to be defeated; that is, by the same means by which a similar claim arising by custom, prescription, or grant, would now be defeasible; and therefore it may be answered by proof of a grant or of a licence, written or parol, for a limited period, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised. So far the construction of the act is clear, and this enjoyment of twenty years having been uninterrupted and not defeated on any ground abovementioned, would give a good title; but if the enjoyment take place with the acquiescence or by the laches of one who is tenant for be only, the question is, what is its effect, according to the true meaning of the statute? Will it be good to give a right against the see, and against those claiming under it by a new lease? or only as against the termor and his assigns during the continuance of the term?

1834. WALKER. BRIGHT v.
WALKER.

or will it be altogether invalid? In the first place, it quite clear that no right is gained against the bisho whatever construction is put on the seventh section, admits of no doubt under the eighth. This section p vides, "that when any land or water upon, over, from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before-mentioned during the continuance of such term, shall be excluded in the computation of the said period of forty years (viz. in sect. 2. mentioned), im case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant or the determination thereof. It is quite certain that enjoyment of forty years instead of twenty, under the circumstances of this case, would have given no title against the bishop, as he might dispute the right at an time within three years after the expiration of the lease; and if the lease for life be excluded from the longer period as against the bishop, it certainly must from the shorter. Therefore there is no doubt but the possession of twenty years gives no title as against the bishop, and cannot affect the right of the see.

The important question is, whether this enjoyment, it cannot give a title against all persons having estates the locus in quo, gives a title as against the lessee and the defendant claiming under him, or not at all. We have had considerable difficulty in coming to a conclusion on this point, but on the fullest consideration we think that no title at all is gained by a user, which does not give a valid title against all, and permanently affect the fee.

Before the statute this possession would indeed have en evidence to support a plea or claim by non-existing rant from the termor in the locus in quo to the termor meder whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence; and in practice the usual course was to state a grant by an owner in fee to an owner in fee. (a). But we think that since the statute such a qualified right is not given by an enjoyment for twenty years. For, in the first place, the statute is "for the shortening the time of prescription," and if the periods mentioned in it are to be deemed new times of prescription, it must have been intended that the enjoyment for those periods should give a good title against all; for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the fee in the land. In the next place, the statute no where contains any intimation that there may be different classes of rights qualified and others.

absolute, valid as to some persons, and invalid as to others.

From hence we are led to conclude, that an enjoyment of twenty years, if it give not a good title against all, gives no good title at all; and as it is clear that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the bishop now, and is therefore not good as against every one, it is not good against any one, and therefore not against the defendant. This view of the case derives confirmation from the seventh section, which is as follows:—" Provided also, that the time during which any person otherwise capable of resisting any claim to any of the matters before

mentioned, shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pend-

BRIGHT v.

BRIGHT v.
WALKER.

ing, and which shall have been diligently prosecut until abated by the death of any party or parties therto, shall be excluded in the computation of the period hereinbefore mentioned, except only in cases where right or claim is hereby declared to be absolute and defeasible:" (viz. by sect. 2.) This section, it is to observed, in express terms excludes the time that the person (who is capable of resisting the claim to the way) is tenant for life; and unless the context makes it necessary for us, in order to avoid some manifest incomgruity or absurdity, to put a different construction, we ought to construe the words in their ordinary sense. That construction does not appear to us to be at variance with any other part of the act, nor to lead to any absurdity. During the period of a tenancy for life, the exercise of an easement will not affect the fee; in order to do that there must be that period of enjoymerst against an owner of the fee.

The conclusion, therefore, at which we have arrived is, that the statute in this case gives no right from the enjoyment that has taken place; and as sect-6. forbids a presumption in favour of a claim to be drawn from a less period of enjoyment than that prescribed by the statute, and as more than twenty years is required in this case to give a right, the jury could not have been directed to presume a grant by one of the termors to the other by the proof of possisession alone. Of course nothing that has been said by the court, and certainly nothing in the statute, will prevent the operation of an actual grant by one lesse to the other proved by the deed itself, or upon proof its loss, by secondary evidence; nor prevent the just from taking this possession into consideration, with other circumstances, as evidence of a grant, which they may still find to have been made, if they are satisfied that it was made in point of fact.

IN THE FOURTH YEAR OF WILLIAM IV.

We are therefore of opinion that in the present case plaintiff is not entitled to recover, and that a nont must be entered.

1834. BRIGHT υ. WALKER.

Rule absolute.

In the matter of the Estate and Effects of JOHN WILKINSON, deceased.

FOHN WILKINSON by his last will dated 20 A will direct-April 1831, bequeathed as follows:—After all my ed executors to lay out the st debts and funeral expenses are paid, my will and residue of the leasure is as follows:—In case my beloved wife, Mary the funds, and Wilkinson, should survive me, that my executors here-divide the inster named do pay my beloved wife 300%, per annum, poor pious by even and quarterly payments, during her natural persons, male ife. Item, I give and bequeath to my son Jacob Wil- or infirm, in kinson, shop-keeper at Southgate, Middlesex, all the they should stock in trade, also my freehold estate, No. 8, Watling see fit." Held, Street, let at 300l. per annum, with the rents of my executors two houses at Highbury Place, Islington, Nos. 13 and could not be 20. during the term of the leases, also my silver cup. pay legacy To my daughter, Jane Smith, now residing in Castle duty as beneficial legatees; Street, St. Martin's Lane, 20001. and the house I now and secondly, live in 32, Ebury Street, Pimlico, formerly 5; also my and pious persilver waiter. Item, to the treasurer for the time being sons are not of the Wesleyan Stranger's Friend Society, for visiting the bequest the sick and poor at their own houses, 100l. To the as a class, but treasurer for the time being of the Dispensary in Sloane vidual selected Square, 1001. To the treasurer for the time being of by the executhe Westminster Hospital, 1001. Item, to John Forrest, person so beon of George Forrest (yeoman), the sum of 191, 19s. was consehem, to James Brothers, son of James Brothers (yeo-quently liable

terest "among or female, old 10l. or 15l., as first, that the called on to that " poor benefitted by that each indinefitted, and to pay the duty when the sum received

should exceed 201., such duty to be then retained by the executor accordingly, after being calculated according to the party's propinquity in blood to the testator.

1834.

In re
Wilkinson.

man), the sum of 191. 19s. As to my wearing apparel, linen, household furniture of every description, my son and daughter may divide or sell, as they please. Finally, after my just debts and legacies are paid, my will and pleasure is, that all my money in the banker's hands, bills of exchange, &c. &c. be collected into cash and laid out in the funds in the Bank of England, where I now have considerable property; and that my executors hereafter named, and their heirs and assigns, do receive the interest thereof at the Bank half yearly, and "divide it amongst poor, pious persons, male or female, old or infirm, in 101. or 151., as they see fit, not omitting large and sick families, if of good character."

By a codicil, dated 27th July 1833, the testator, afterseveral bequests and legacies, directed that the legacy duty payable in regard of the several legacies and bequests in his will, and the codicil mentioned, should be charged upon and paid out of his personal estate and thereby confirmed his said will.

The executors having paid legacy duty on everybequest but the last, to "poor pious persons," a rule was obtained under 42 G. 3. c. 99. s. 2. calling on the to pay legacy duty on that also.

Stephen Serjt., Dixon and Gurney showed cause. The plain meaning of the third part of the schedule are nexed to 55 G. 3. c. 184. shows that legacy duty not here payable. It is headed thus—Legacies are Successions to personal or moveable estate upon it testacy, where the testator, testatrix, or intestate shall have died after 5 April 1805. For every legacity specific or pecuniary, or of any other description, with amount or value of 201. or upwards, given by will or testamentary instrument of any person who shall have died after the 5th day of April 1805, either out of his or her personal or moveable estate, or out of or

charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged after the 31st day of August 1815. Also for the clear residue (when devolving to one person), and for every share of the clear residue (when devolving on two or more persons) of the personal or moveable estate of any person who shall have died after the 5th day of April 1805, after deducting debts, funeral expenses, legacies, and other charges first payable thereout, whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy, where such residue or share of residue shall be of the amount or value of 20% or upwards, where the same shall be paid, delivered, retained, satisfied, or discharged after the 31st day of August 1815. And also for the clear residue (when given to one person), and for every share of the clear residue (when given to two or more persons) of the monies to arise from the sale, mortgage, or other disposition of any real or heritable estate directed to be sold, mortgaged, or otherwise disposed of by any will or testamentary instrument of any person who shall have died after the 5th day of April 1805, (after deducting debts, funeral expenses, legacies, and other charges, first made payable thereout, if any), where such residue or share of residue shall amount to 20%. or upwards, and where the same shall be paid, retained or discharged after the 31st day of August 1815. The several amounts of duty differing when the legacy or residue is for benefit of a child, or any descendant of a child of the deceased, as well as of a father, mother, brother or sister, or descendant of either, or stranger in blood, are then subjoined. Next, all gifts of an-

In re Wilkinson. 1834. In re WILEIX50X. nuities, or by way of annuity, or of any other partial benefit or interest out of any such estate or effects, are to be deemed legacies: and where a legatee shall take two or more distinct legacies as benefits, together amounting to 20%, they are chargeable, though each separately is under that sum. Three exceptions follow in favour of legacies &c. to or for the benefit of the husband or wife of the deceased, of any of the royal family, and of certain specific legacies to bodies corporate, or other public bodies exempted by 39 G. 3. c. 73. from the payment of duty.

All these enactments show that legacy duty was only intended to attach on the beneficial interests taken by legatees, and on them individually in respect of their beneficial interests; or the exemptions and variations in the scale of duty would be without meaning. Though the earlier part of the schedule may seem to impose the duty generally on the legacies, the subsequent clauses limit its operation, and show that the only cases within the words or contemplation of the act are those where it may be affirmed that a legacy or residue is to be taken for the benefit of some individual who is either related to the deceased or not. Now, as under the present bequest no individual can take beneficially more than 15%, the present case is wholly out of the operation of the schedule, which by the enacting part which imposes the duty, limits the description that the legacy shall amount to 20% or upwards. Had this unanimity been conferred by way of exemption, the parties claiming it must have brought themselves within it, but it here clearly lies on the crown to show that the legacy is of 20% amount, and so chargeable with duty. What individual person, taking a beneficial interest, is to pay duty here, except it be the "poor, pious person" to whom the trustees may think fit to allot a share of the fund bequeathed?

No scale of duty provided by the schedule can otherwise be applied. A remote descendant of a brother or sister of the deceased might be fixed on as an object of his posthumous bounty; and if so, he would be entitled to it on payment of only 31. per cent. legacy duty. If, however, it is said the "poor, pious persons" to be fixed on by the trustees are to be considered and taxed as a class, they will, as strangers in blood, pay 101. per cent., amounting in this case to 3000l.; but that would wholly disregard the distinction intended to be preserved between persons of the blood of the testator and strangers to him in blood. Besides, to tax them as a class would be to tax the fund and not the individuals, for though the trustees would have less to distribute after the 101. per cent. had been paid by them out of the fund, the objects of their selection might receive the same amounts. Can, then, a legacy itself be taxed without adverting to the degree of relationship to the deceased in which the person to take the benefit may stand? [Alderson B. In the instance of the bequest to the Westminster Hospital, who would take the beneficial interest? If legacy duty be payable on a bequest to a public body or institution not corporate, as to any hospital, museum or library, is a bequest for the benefit of the body which takes the beneficial interest? whereas, here, the beneficial interest being by the terms of the will to be taken by ulterior persons, the tax must fall on them. in truth the legatees, though when selected by the trustees; whereas, though a patient in a hospital receives benefit from being cured there, the character of legatee cannot be ascribed to him. Corporate bodies are strictly liable to duty. How can the trustees, distributing a fund to others, who receive the ulterior benefit, be liable to this duty? If they could, then, if they were sons of the deceased, as is here the case

In re Wilkinson.

In re
Wilkinson.

with one of them, a smaller amount of duty would be payable, or if the trustee was a wife, no duty at all; though all the parties ultimately to be benefitted might be strangers in blood to the testator, and therefore clearly intended by the act to pay 10%, per cent. on any legacy amounting to 201. To charge the trustees, who take no beneficial interest, is to charge the fund in the aggregate, for which there appears no authority under the act. But if these "poor pious persons" are not to be considered as taking a beneficial interest as legatees under the will, it will follow that there are none who do. Then no legacy duty will be payable; for if there can be a case where no individual takes a beneficial interest, it is not within this act. That may have been the intent of the legislature; as in such a case the legacy is to that public whose establishments the duty is intended to support. If it is said that 15% is not necessarily the maximum to be received, because that gift may be repeated yearly, it may be answered that trustees for the crown must make out affirmatively that this is a legacy amounting to 201., and not rest on supposed case that it might at a future time amount term that sum. At all events, it would only attach in the particular case when it arose, if indeed under this will the trustees could so dispose of the fund. But 36 G. 3. c. 52. in stating what shall be deemed legacies within the act, provides by s. 7. that any gift by are will or testamentary instrument of any person dying after the passing of this act, which shall by virtue of such testamentary instrument have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a "legacy" within the intent and meaning of this act, whether the same shall be given by way of annuity or in any other form;

and then, after directing how the value of annuities shall be calculated, and the way in which the duty thereon shall be charged, enacts by s. 11. that if any benefit shall be given by any will or testamentary instrument, in such terms that the amount or value of such benefit can only be ascertained from time to time by the actual application for that purpose of the fund allotted for such person or made chargeable therewith, or if the amount or value of any benefit given by any will or testamentary instrument cannot by reason of the form and manner of the gift be so ascertained that the duty can be charged thereon under any other directions herein contained, then and in every such case such duty shall be charged upon the several sums of money or effects which shall be applied from time to time for the purposes directed by such will or testamentary instrument as separate and distinct legacies or bequests, and shall be paid out of the fund applicable for such purposes, or charged with answering the same. Now that section seems closely adapted to meet the difficulties of this case. For here, the amount or value • the bequest "can only be ascertained from time to time by the actual application of the fund," so as to charge the duty accordingly.

Exparte Franklin (a) was decided by the Vice-Chancellor on petition, the question having arisen incidentally the administration of a testator's estate. The testator there by will gave and bequeathed to the poor of Hadenham a legacy of "501. per annum for ever, to be laid out at Christmas, in bread, and distributed by the minister and churchwardens to the most needy objects in the parish," and charged his leasehold and personal property with it. The poor of Haddenham consisted of 20 persons, so that no one person could in a year receive 2s. in bread. When argued that it must go

In re Wilkinson. In re
WILKINSON.

to them as a class, the Vice-Chancellor held that it was a legacy on which the duty ought to be paid. He said, that though not expressed to be given to any individual, it was in effect given to the executors in such a manner as that they held it in trust for certain purposes, and that the mode in which it was given did not admit of its being ascertained what sum or precise benefit any one individual would have in the legacy. He afterwards said, that it was in effect a gift for charitable purposes, observing that the legislature seemed to have supposed that in cases where the degree of relationship could be ascertained, there should be a progressive charge; but that in the case before him the legacy was so given that kindred seemed to be out of the question, and that here was a complete sum of 50%, for charitable purposes. In other words, he held the duty chargeable on the fund, not on the indivi-That construction, it has been submitted, carnot be the intention of the act. He further said, "with regard to legacies given to charities, there has been by the general assent of mankind, a construction put on the statutes so as to charge such bequests with legacy duty. When legacies have been given to treasurers of hospitals and other charitable institutions, it has been considered as a matter of course to pay the duty." That may be so, for the hospital or charitable institution, particularly if corporate, being a body already combined for and interested in the attainment of a particular object, is the beneficial legatee of a bequest given for that object; so in the case then sub judice the parish might well be considered as a body taking beneficially, being benefitted by the relief of their poor, whom they were bound by law to maintain. But 36 G. 3. c. 52. s. 7. was not then adverted to, which alone invalidates that decision. Nor can any inconvenience arise from postponing the payment of legacy

y till the benefit to each legatee amounts to 201., by 36 G. 3. c. 52. s. 27. 28. & 29. no legacy is to paid without a receipt duly stamped; i. e. the rept cannot be stamped till the duty is paid.

In re WILEINSON.

The Attorney-General (Sir John Campbell), Amos and George Grey, for the crown. The right to legacy v accrues under 36 G. 3. c. 52., though its amount That act provides by s. 6. been since increased. That the duties hereby imposed shall in all cases in ich it is not hereby otherwise provided, be accounted , answered, and paid by the person or persons havor taking the burthen of the execution of the will other testamentary instrument, or the administration the personal estate of any person deceased, upon ainer for his, her, or their own benefit, or for the sefit of any other person or persons, of any legacy, any part of any legacy, or of the residue of any pertal estate, or any part of such residue which he, she, they shall be entitled so to retain, either in his, her, their own right, or in the right or for the benefit of y other person or persons." So that when the exefor retains for the benefit of any other he is to pay acv duty. The legislature could not have intended at the poor persons should pay the legacy duty and re stamped receipts; and the section quoted, as to reher by an executor, avoids any such difficulty. Either legacy or residue the 3000%. must be retained by the ecutors for the benefit of their ultimate appointees. 55 G. 3. c. 184. duty is to be paid on every legacy 201. given by any will, either out of personal estate , and which shall be paid, delivered, retained, satis-1, or discharged after 31 August 1815, and upon he clear residue, when devolving to one person, and my share of the clear residue when devolving to two more persons of the personal estate," &c. whether FOL. IV. M M

In re
Wilkinson.

the title shall accrue by testamentary disposition or on intestacy, "where such residue or share of residue shall be of the amount of 201. or upwards, and where the same shall be paid, delivered, retained, satisfied, or discharged after 31 August 1815." Then, where the residue is of 201. value, and retained by the executor after 31 August 1815, duty is to be paid. This residue retained has been admitted to exceed 30,000%.

Stat. 39 G. 3. c. 73. was an act for exempting from payment of legacy duties certain specific legacies gives to bodies corporate and other public bodies and societies, enumerating books, prints, gems, &c. that act, specific legacies of these articles to such bodies would have been liable to duty as they now are if of articles not so enumerated, or if pecuniary; yet no beneficial interest is taken by any individual. the entire sum bequeathed to the charitable objects must be considered as the legacy, and not the smaller parts into which it is to be divided in order to distribution. On this principle has legacy duty been paid on the bequests in this will to the treasurer of the Wesleyan Stranger's Friend Society, for visiting the sick and poor at their own houses. It is said, that if a legacy be given to a person without his taking a beneficial interest, it is a casus omissus; but in the instance above mentioned, as well as the other bequests to charitable institutions on which the duty has been paid, the argument equally attaches. The treasurer of the Wesleyan Society takes no beneficial interest, and no one else could sue as legatee. Here, had the bequest been to any named persons, of sums under 201, they would have been legatees, who might have called on the executors to pay the amount, but as the executors here hold every thing at their discretion, the person who takes the bounty takes by their gift, not by the will, and they only can call themselves legatees. The

mcertain amount of the residue makes no difference. It may be taken as a legacy of 30,000l. to the executors to be divided "among poor and pious persons, male or female, old or infirm, in 10l. or 15l., not omitting large and sick families, if of good character." The executers would then take the whole sum to be distributed a they saw fit. Suppose no limitation as to the 101. or 15%, or that the sums to be distributed had been fixed at a sum above 201., still the persons receiving them by gift of the executors would not be legatees mader the will, or liable to pay the duty. The execuwho retain the fund bequeathed must pay it withput deducting it from the sums given. Then, if the soor and pious persons would not, in the case put, be in ble to legacy duty, not being to be considered as egatees, then they cannot be considered such in a where they take less than 201. and no legacy duty 4 payable. The persons who retain the fund bereathed have patronage in disposing of it according the direction in the will. [Parke B. If the executors re to be treated as legatees, what rate of duty is the of the deceased to pay? You say he retains for use of strangers; that is, that it is not a legacy to the executors, but to the poor as a class. If so contrued, the executors retain for the poor as a class. Alderson B. Some of that class might be relations of testator.] The amount of duty would vary in such enses. [Parke B. The interpretation you would give the act is as if instead of the last description of legacy mentioned in it being to a person "in any other derree of collateral consanguinity to the deceased, or to or for the benefit of any stranger in blood to the deceased," E were "to any other person or persons soever," that to any others than those before alluded to.] That eems to have been so considered in Ex parte Franklin, where it was held that it was not necessary to wait to

In re Wilkinson.



see whether the object of bounty was to be a relation or not before the legacy duty was payable. That decision did not turn on the benefit to the parish, nor was it the case of a body corporate, but it was treated as analogous to that of a bequest to a hospital and the usage in such a case. To wait for legacy duty in the latter case till a patient had received 201. benefit from the bequest, or in the present, till the trustees select the same person on two occasions, so as to receive 201. in all, would be inconvenient; and it would be much more reasonable to treat it as a general legacy for charitable purposes, within the usage sanctioned in Exparte Franklin.

Besides, under the terms of the will, a legacy of the residue is constituted, and the duty would attach or the whole corpus of it without considering the legac as divisible or divided into as many portions as there are persons selected by the executors to take a bount under it. Now, section 6. of 36 G. 3. c. 52. clearly establishes a difference between the payment by executors of a legacy to a legatee, and a retainer by them of legacies for the use of others. Then sect. 27. shows that this is not a case in which the receipts there directed to be taken by executors on paying legacies to legatees could not have been intended to be taken by the executors (a). This residue therefore must be taken as one undivided legacy to the executors, subject to certain directions as to the disposal of it by them, without marking out any individual to whom they are to pay any part of it. [Parke B. You say that it is not to be considered as a legacy to the individuals who receive the money, but that they take as by the gift of the executors. The question remains whether this is a "legacy" within the act; whether a legacy to a class

⁽a) See also s. 5. & 6. and s. 35.

of this sort falls within the last description in the schedule, "to persons in other degrees of consanguinity or strangers in blood?" If, instead of those words, the act had run, a legacy "to any other person or persons whomsoever," a legacy to such a class would have been clearly within it.]

In te WILKINSON.

Cur. adv. vult.

The judgment of the court was now delivered by

PARKE B.—The question which arises in this case is, whether the executors are liable to pay the duty on this legacy, and to what amount. By 36 Geo. 3. c. 52. s. 6., the duties imposed by that statute are to be accounted for, answered, and paid by the persons taking upon themselves the execution of the will, upon retainer for their own benefit, or the benefit of any other person or persons, of any legacy, or the residue of any personal estate, or any part of such residue; and also upon delivery, payment, or other satisfaction of any legacy, &c. And by 55 Geo. 3. c. 184., schedule, part 3, the duties therein mentioned are imposed upon every legacy or share of residue paid, delivered, retained, satisfied or discharged. But it is obvious that the executors are to be accountable for no duties except those which are specifically imposed by the act of parliament, and the question is, whether any and what duty is imposed upon such a legacy as this.

In order to determine this question it is necessary to take a short review of the different acts of parliament on this subject. The first statute imposing duties on legacy receipts, was the 20 Geo. 3. c. 28., which enacted that a duty should be paid on every receipt for any legacy or part of a personal estate divided by force of the statute of distributions, or the custom of any

WILLIESON.

CASES IN TRINITY TERM province or place. The 23 Geo. 3. c. 58., and 29 Geo. 3. c. 51., increased the amount of those duties, adopting similar language. The 36 Geo. 3. c. 52. enacted, that these duties should cease, and repealed so much of the before-mentioned statutes as related to them, and proceeded to impose fresh duties, on the same principle and in nearly similar terms, except as to amount, as are contained in part 3 of the schedule to 55 Geo. 3. c. 184 the statute now in force. The 7th section provides, "tha = any gift by any will or testamentary instrument of an person dying after the passing of that act, which shall by virtue of such will or testamentary instrument have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be legacy within the intent and meaning of this act, whe ther the same shall be given by way of annuity or in

Then follows, after others, this important clause. Sect. 11. "If any benefit shall be given by any will any other form." testamentary instrument, in such terms that the and or value of such benefit can only be ascertained fr time to time by the actual application for that pur of the fund allotted for such purpose, or made ch able therewith; or if the amount or value of any t given by any will or testamentary instrument can reason of the form and manner of the gift, be s tained that the duty can be charged thereon u other of the directions herein contained; the every such case such duty shall be charge several sums of money or effects, which shall from time to time for the purposes directs will or testamentary instrument as separate legacies or bequests, and shall be paid out applicable for such purposes, or charg

· 1834. In le

wering the same." The stat. 39 Geo. 3. c. 73., exmpts certain specific legacies which shall be given or equeathed, to or in trust for any body corporate, Wilkinson. hether aggregate or sole, or to the society of Serjeant's or any of the inns of court or chancery, or any adowed school, in order to be kept and preserved by ch body corporate, society or school, and not for the arpose of sale; it also exempts a certain legacy to the ustees of the British Museum. The statute now in rce is the 55 Geo. 3. c. 184., and sched. 3. part 2. rovides, that for every legacy, residue, or share of esidue, of the amount or value of 201. and upwards, there any such legacy, residue, or share of residue, hall have been given to or for the benefit of a child, a luty shall be paid of one per cent.; an increased duty or more distant relatives. "And where any legacy &c. hall have been given to or for the benefit of any person n any other degree of collateral consanguinity than above described, or to or for the benefit of any granger in blood, then a duty after the rate of 10l per cent." And the schedule provides that all gifts of annuities, or by way of annuity, or of any other partia benefit or interest, shall be deemed legacies within the intent of this act. And there is an exception of legacies which were exempted from duty by the 39 Geo. 3. Considering the provisions of these statutes c. 73. together, it seems clear, in the first place, that the legislature intended to subject all legacies above 201. in value, to a duty, whether given to individuals or to bodies corporate, or societies. For the statutes prior to 36 Geo. 3. in terms comprise all legacies: and though that statute, after enumerating those to persons in different degrees of consanguinity, mentions only legacies which shall be given or shall pass to or for the benefit of any person in any other degree of collateral poneanguinity, or of any stranger in blood, and not all



other legacies; yet taken in conjunction with the 39 Geo. 3., it clearly means to comprise not merely legacies to individuals, but to bodies corporate and societies. In the second place, it appears to be equally clear, that the persons, bodies corporate, or societies, who take the beneficial interest in the legacy, that is, those who actually receive the benefit, are ultimately to pay the duty. And in the third place, that any benefit given by will which shall by virtue of the will be satisfied out of the personal estate, is a legacy within the meaning of this act. Now, in this case, who are the persons who take the beneficial interest in this legacy of the residue They must be either, first, the executors themselves = or, secondly, the individuals selected by them; or thirdly, the whole body of poor and pious persons out of whom the selection is to be made. The gift must enure to the benefit of one of the three descriptions •1 persons, for no others can be suggested; and there can be no case of a legacy under a will which is not beneficial to some persons. First, The executors have no beneficial interest in the legacy; their duty is simply to divide the annual interest among such poor and pious persons as they think fit in sums of 101. and 151. each-They can make no other appropriation or disposition of the money. It appears to us, therefore, that they cannot be charged as beneficial legatees.

It remains therefore to consider whether the individuals actually benefited, or the whole body of persons that may be benefited, are the beneficial legatees? It appears to us, that all poor and pious persons whatsoever cannot be considered as a society, or body of persons, or class, taking the benefit of this legacy. The whole body has no power or control over the fund, nor has any trustee or agent for them such power or control: nor has any individual falling under the description of poor and pious, any right whatever to any

*1*29

portion of it. All he has is the chance of being nominated as a fit person to receive part of the money. We cannot think that these persons are a body, taking as such the beneficial interest in the legacy; and we must therefore hold that the individuals selected are the persons who take a benefit under the will, and are consequently liable to the duty, in those cases in which duty attaches; and the clause of 36 Geo. 3. c. 52. s. 11. above referred to, seems to us to be exactly applicable to this case. The result is, that such individuals will be liable to the duty where the sum received by each exceeds 201., and then and not till then the executors will be accountable and bound to retain the duty according to the rate applicable to each person who receives the testator's bounty.

By our present decision we do not mean to question the legality of the practice of imposing the highest rate of duty on bequests to corporations, or societies established for charitable purposes, or to individuals in trust for such societies. Legacies of this description are contained in this will, and they are cases in which the entire control and power over the legacy is vested in the corporations or societies therein named, or in those who have the governing authority over them. The legacies go into their general fund. On such cases the corporation or society may not improperly be considered as taking the entire beneficial interest. The case of Ex parte Franklin (a), the authority of which has been pressed upon us, is more difficult to distinguish from the present, and we are not sure that it can be satisfactorily distinguished. That was a legacy to the executors in trust for the poor of a particular parish, and it may possibly be contended that the poor of one parish is in the nature of a corporation



what precise benefit any individual would I legacy, is certainly removed by a reference clause in 36 Geo. 3., which clearly shows the on which it was impossible to ascertain where was taken, until the money was applied, are to individuals, and liable as such to duty under the result is, that in our opinion, formed a some difficulty and doubt, the rule must be and that the executors cannot be called u the duty on the whole of the residue.

Rule die

IN THE EXCHEQUER CHAMBER.

CHAMBERS, the Elder, against BERNASCONI and Others.

(In Error from the Court of Exchequer.)

Before Lord DENMAN C. J. of K. B.—TINDAL L. C. J. -LITTLEDALE, TAUNTON, and PATTESON Justices of K. B. - PARKE, GASELEE, and BOSANQUET Justices of C. P.

· A SSUMPSIT for money had and received. Plea, A written megeneral issue. This action was brought to try the morandum of an arrest, and validity of a commission of bankrupt issued against the of the place plaintiff on 19 November 1825, under which the decurred, made fendants had acted as assignees. The plaintiff, a by a sheriff's trader, had been arrested at his residence, Maida Hill, temporaneous-Paddington, in June 1825, after being denied to the officer. He was again arrested on 9 November in that sent immeyear, viz. about two months after the new bankrupt act, diately to the sheriff's office, 6 Geo. 4. c. 16. had come into operation; and whether and there filed the second arrest took place at Maida Hill, or in of business, is South Molton Street, became the material question in not admissible the cause, in order to establish or disprove the specific place at which act of bankruptcy relied on in support of the commission, viz. the keeping house by the plaintiff, and deny- death of the ing himself to creditors at Maida Hill. The plaintiff officer, in an action between was interested in proving the arrest of 9 November to third perhave taken place in South Molton Street, at a house which was not his residence, but had been taken by the taken before committee appointed to investigate his affairs, where of bankrupt, he attended them daily. On the other hand, the ob- and inrolled by the assigject of the defendants was to show that the plaintiff nees according

officer, conly with effecting the arrest, in the course evidence of the

commissioners to 6 Geo. 4. c.

16. s. 96. are not evidence against them in an action brought to dispute the commission, by disproving the act of bankruptcy on which it is founded.

CHAMBERS
v.
BERNASCONI
and Others.

was arrested on the same 9 November 1825, at his residence at Maida Hill, after being denied to the officer. The case was first tried before Lord Lyndhurst C. B., at the sittings after Hilary term 1831, when the plaintiff had a verdict. A rule for a new trial having been afterwards made absolute, [see Vol. I. 335,] the case was tried again before Lord Lyndhurst. plaintiff certain depositions were offered in evidence, viz. depositions of Wright, the sheriff's officer, who had on both occasions arrested the plaintiff, and of Fletcher, a clerk to the plaintiff, employed at the office in South Molton Street on 9 November 1825, both since deceased, taken before the commissioners of bankrupt, and showing the arrest on the latter day to have taken place in South Molton Street. The under-sherist for Middlesex was then called, and produced from the sheriff's files the writ on which the arrest of 9 November had taken place; and having stated, that by the course of the office, every bailiff making an arrest was required immediately afterwards, and before taking a bail-bond, to transmit to the office a memorandum or certificate of the arrest, and that for the last few years an account of the place where the arrest took place had been also required from him, produced from the same files a paper writing or certificate which was annexed to the writ, and purported to be signed by the officer Wright, proved to be since deceased, and addressed to the witness as under-sheriff of Middlesex.

"9 November 1825.

"I arrested Abraham Henry Chambers the elder only (a), in South Molton Steet, at the suit of William Brereton.

" Thomas Wright."

The Lord Chief Baron having rejected this evi(a) The writ having been against him and his son.

dence, the defendants had a verdict. The case now came before this court on a bill of exceptions, tendered on behalf of the plaintiff to, and sealed by the learned Lord Chief Baron on his rejecting the above evidence.

CHAMBERS v.
BERNASCONI and Others.

The Attorney General (Sir John Campbell), for the First, the depositions which were rejected stated, that when the officer went to the plaintiff's cottage at Maida Hill to arrest him in June 1825, he was denied by his servant, but being found by the officer in a room in the house, was arrested by him at that time and place. That was an act of bankruptcy by keeping house; whereas the arrest of the plaintiff on 9 November in that year, at the house of his committee in South Molton Street, was not. It was, however, necessary for the defendants to prove that the act of bankruptcy relied on was committed after the 1 September 1825, when 6 Geo. 4. c. 16. came into operation, order to support the commission which had been issued after that act, according to Maggs v. Hunt(a); and was thereupon contended for the plaintiff, that the accircumstances of his arrest in June at Maida Hill ere sought to be transferred to his second arrest in **November**, which the evidence in question was offered show had taken place in South Molton Street.

First, the depositions should have been admitted in evidence for the plaintiff, against the assignees acting under the commission issued against him. By 5 Geo. 2. c. 30. s. 41. the depositions taken on commissions of bankruptcy might be entered of record on petition, and in case of the death of the witnesses proving such bankruptcy, or in case of the loss of the originals, copies of such records might be given in evidence to prove such commissions, and the bankruptcy of the persons against whom they issued, "or other matters

CHAMBERS

7.

BERNASCONF and Others.

or things," e. g. the precise time when the act of bank ruptcy specified therein was committed; Janson an Others v. Willson(a). By the present bankrupt act, Geo. 4, c. 16, s. 92, depositions taken before the con missioners of (inter alia) the act of bankruptcy, a made conclusive evidence of the matters therein r spectively contained in certain actions by the assigned but by sect. 96 they must first be entered of record, o application of a party interested therein. Office copis are made evidence by sect. 97. But the clause of 5 Ga 2. c. 30. s. 41. making them evidence in case of the deat of the witnesses proving the bankruptcy, not being n enacted in 6 Geo. 4. c. 16. s. 92.(b), the proof of the depositions, when offered on behalf of the assignees i Bernasconi and Others assignees, v. Farebrother, w rejected by Lord Tenterden, and again by Alexands C. B., when tendered on behalf of the same sheriff, what was sued for a false return by Wilton. No enactmen appears by which they are made evidence against # assignees, to disprove the validity of the commissi for, by the common rules of evidence, they must be admissible; for they are examinations taken in course of a judicial proceeding had by the petitic creditor, who must be presumed to be in privity the after-appointed assignees, in order to asc whether the plaintiff could be legally declared a rupt under the commission, and from witness duced substantially for the other creditors, and port of the commission. Positive enactment we fore necessary to make them in any case evid the assignees, whose title-deeds they in

⁽a) Doug. 257.

⁽b) An omission now remedied by 2 and 3 Will. 4. c. 1 amend 6 Geo. 4. c. 16. except in actions then, (vis. 15 August: by which the validity of a commission was brought in questi 542.

[Taunton J. Meetings to open commissions and declare a party bankrupt were strictly private, the only persons present before the commissioners being the solicitor to the commission and his witnesses, so that there would be no opportunity for cross-examination as to the act of bankruptcy; the witnesses were supposed to be produced by the petitioning creditor, who is however often in an interest different from that of the assignees afterwards appointed.] A fortiori, the depositions so taken would not, at common law, be evidence for the parties who produced the witnesses, though they might be evidence for strangers against them. In this case the two defendants, the assignees, by inrolling these depositions of record in hope to make them evidence in support of their then view of the case, have themselves authenticated them. That eminent writer on evidence, Mr. Starkie, says(a), that depositions of witnesses, though made under the sanction of an oath, are not in general evidence as to the facts which they contain, unless the party to be affected by them has cross-examined the deponents, or has been legally called on, and had the opportunity to do so:" to which should be added, "or unless the party against whom the depositions are proposed to be used has adduced the witnesses who made them." In page 268, the same learned writer says, "Depositions in a former cause cannot in general be read against one who does not claim under the party (in the suit) with whom such depositions were taken, but at law they may be read where the defendant claims in privity with the defendant in the former suit." Then as the assignees claim under the commission, in privity with those who adduced witnesses in support of it, it is stronger to show that the depositions of those witnesses are evidence against them, than if a mere op-

1834.
CHAMBERS
v.
BERNASCONE
and Others.



portunity for cross-examination had been given at the meeting to a party in an adverse interest. At least they were evidence for the jury till contradicted.

Secondly, after the death of the arresting officer, the written certificate made by him at the time, and sent in the course of office to the under-sheriff, who produced it, was admissible in evidence, to show as well the place where the arrest took place as the fact of such arrest; for it is a written declaration of a fact made at a time when it was not in dispute, by a person peculiarly cognizant of it, having no motive to misrepresent it, against his interest and in the discharge of his duty. according to the course of office, and is therefore unlike a case of verbal hearsay. And first, it was evidence of the fact of arrest, it being against the interest of the officer to charge himself with the receipt of the body of the plaintiff. If the acknowledgment of the receipt of money or goods, for which a party is accountable, be evidence against him, because against his interest, this document is admissible for a similar reason: for the sheriff is precluded by it from afterwards returning non est inventus, and it would have fixed his liability for an escape. But if the officer was not interested either way, his memorandum of a fact within his knowledge, in the execution of his duty, and according to the course of office, is receivable in evidence after his In Doe d. Patteshall v. Turford(a), the quetion at the trial was, whether a notice to quit had been served? For the lessor of the plaintiff it was proved to be the invariable course of his attorney's office, for the clerks who served the notices to quit, to indorse on a duplicate of such notice a memorandum of the fact and time of service. On this particular occasion the attorney (who had died before the trial.) himself prepared a notice to quit, to serve on the defendant, took

BERNASCONE and Others.

it out with him with two others, prepared at the same time, and returned to the office in the evening, having indorsed on the duplicate of each notice a memorandum of its delivery to the tenant. Two of the notices having been proved to have been served by him on that day, it was held that the indorsement so made by him on the other, was admissible evidence to prove the service of the third notice. [Tindal C. J. That entry was corroborated by other circumstances rendering it probable that the fact of service occurred as stated. A clerk may have a present interest in deceiving his employer, for by entering a service as made, though he has neglected to do so, he avoids inquiry at the time, and he may hope it will never be in question; while if he lives, it could not be offered in evidence.]

Next, the certificate was admissible to show the place where the arrest was made. An entry made by a party deceased, which may be read in evidence, is proof of all the collateral circumstances within his knowledge which are mentioned in it, and naturally connected with the subject-matter, if the maker be without interest on the subject, or if his entry is contrary to his interest. Thus books in which stewards charge themselves with receipt of rents from tenants, are seldom produced to prove the receipt of the money only, but to show from whom and when it was received, or the tenure of the land by the party paying. [Taunton J. Doe d. Powell v. Hill, tried at Monmouth assizes before C. B. Richards, corroborates that observation.— The books of a steward were produced to show rents received by him from tenants within a certain ambit. I contended that they could only be received to prove the fact of payment and receipt of rent; the chief baron held, that he could not divide the evidence, or cut the entry into two, for if it was evidence for one purpose it was also for the other.] In Higham v. Ridg-NN

CHAMBERS

O.

BERNASCONT

and Others.

way (a) the time of a birth was the material question, and the entry of a man-midwife marked paid against the interest of the party at the time, was admitted not merely to prove the facts of payment or attendance on the mother, but also to show the precise day of Why, by parity of reasoning, the party's birth. would it not have been evidence of the place of birth, had that been mentioned or material? as, e. g., for eligibility to a fellowship, freedom of a corporation, &s. [Lord Denman C. J. It would not for the purposes of gaining a settlement, Rex v. Erith (b). These entries are generally adduced in order to prove other circum stances naturally connected with the entry. Here part of the duty imposed on the bailiff being to make a certificate of the place where an arrest takes place, be does so in obedience to his superior, either against his own interest, or without interest on the subject. Dee v. Robson (c) supports the position that this document would be evidence of the time of the arrest, and it is difficult to say why it should not equally be so as to the place. In Price v. Lord Torrington (d), an entry signed by a deceased drayman according to the course of business at the brewhouse, stating that he had delivered so much beer that day, was held evidence in an action by his master the plaintiff, for beer sold and delivered to the defendant, though that entry was rether in discharge of the drayman, who was entrusted to deliver the beer. In Pitman v. Maddox (e), in an action for a tailor's bill, his shop-book was allowed in evidence by Lord Holl, it being proved that the vant who writ the book was dead, that the handwriting was his, and that he was accustomed to make the ex-

⁽a) 10 East, 109. (b) 8 East, 539. (c) 15 East, 32. (d) 1 Salk. 285. See Calvert v. Archbishop of Canterbury, 2 Eq. C. N. P. 646. (e) 2 Salk. 690.

Those cases go beyond the object here conaded for. In Hagedorn v. Reid(a) the custom of a erchant's counting-house being shown to be for the erk who copied a licence, to send the original off by e post, and make a memorandum on the copy of havgdone so, a copy of a licence in the merchant's letterook, with a memorandum that the original had been ent to the correspondent abroad, was admitted in evilence after the death of the clerk. In Champneys v. Peek (b) a bill thus indorsed, "March 4, 1815, delivered a copy to C. D.", in the writing of a deceased clerk of the plaintiff, whose duty it was to deliver a copy of the bill, was held evidence to prove the delivery of the bill, the indorsement being shown to have existed at the time of the date. In Pritt v. Fairclough (c) an entry by a deceased clerk of the plaintiff in a letter book, professing to be a copy of a letter of the same date from the plaintiff to the defendants, was held good secondary evidence of the contents of the letter, on proof that secording to the plaintiff's course of business the letters which he wrote were copied by this clerk, and then ent off by post; and that, in other instances, the copies so made by this clerk had been compared with the originals, and always found correct. Nor is Calvert v. Archbishop of Canterbury (d) contrary, for the entry there rejected did not appear to be contemporaneous, of to be made in discharge of the writer's duty. Coper v. Marsden (e) the entry was not shown to be outemporaneous, nor was the clerk dead. In Warren I. Webb v. Grenville (f) entries of the charges made in nattorney's book were admitted to show the surrender fa life estate, in order to support a subsequent reco-

CHAMBERS
v.
BERNASCONS
and Others.

⁽a) 3 Camp. 379. Sec 4 id. 193.

⁽b) 1 Stark. N. P. C. 404.

⁽e) 3 Camp. 305.

⁽d) 2 Esp. C. N. P. 645.

⁽e) 1 Esp. C .N. P. 1.

⁽f) Stra. 1129.

1834.
CHAMBERS
v.
BERNASCONI
and Others.

very. Doe v. Robson (a) is strongly in favour of the The question was, when a particular lease, plaintiff. purporting on the face of it to take effect in reversion, viz. from a future day, was actually granted? as the power under which the lessor assumed to demise, was to grant a lease to take effect in possession only; and entries of charges in an attorney's book, which were shown to have been paid, were admitted to show that it was not really executed till after its date, and after the day named in the lease from which it was to take Lord Ellenborough rests his judgment on the total absence of interest in the parties making the entries to pervert the fact, and at the same time : competency in them to know it. Mr. Starkie, in his excellent work already quoted, says (volume i. 298.) "It may, however, be observed, that the considerationthat the entry was made in the course of discharging a professional or official duty, or even in the ordinary course of business in which the party was engaged, seems, both in reason and upon the authorities, to afford a much safer warrant for giving credit to such evidence, than is supplied by the consideration that the entry or declaration might possibly have been used to the prejudice of the party, and in many instances the doctrine of admissibility on that ground has been pushed to an extraordinary, if not untenable extent." The oral declaration of the father as to the place of the child's birth was rejected in Rex v. Erith, because that not being matter of pedigree, his hearsay evidence was not admissible, as it would have been as to the time of the birth, Goodright v. Moss (b).

Sir James Scarlett contrà. It was at first said that depositions taken before the commissioners would be

⁽a) 15 East, 32.

evidence against the assignees, because it was a judicial proceeding which afforded an opportunity to crossexamine the witnesses there; but after Mr. Justice Tauxton had shown that a party was declared bankrupt at a private meeting, the argument for their admissibility was mainly rested on the supposed privity between them and the petitioning creditors, who having issued the commission had subsequently produced the vitnesses who made the depositions before the commissioners; but how can such privity be taken to exist? A commission having been issued, and the plaintiff decared a bankrupt by the commissioners at their private meeting, the plaintiff acted under it, and put forth a list of proposed assignees. In the event, other persons being proposed for that trust by adverse creditors were elected assignees, after which he disputed the com-These assignees cannot be presumed to be in privity with the petitioning creditor and the witnesses adduced by him before the commissioners. No estate or interest is here claimed under any assignment founded on the particular act of bankruptcy. Had the defendants' title to sue as assignees rested on the depositions only, they must have produced them; but if they were able to support the commission by other means, then if they were produced by the other side to inpugn the commission which they were taken to spport, the assignees might repudiate all privity with them. Still less can the depositions be evidence against the assignees by the bankrupt act, 6 Geo. 4. c. 16., for where in an action against them notice is given by the bankrupt himself of disputing his commission and act of bankruptcy, as was here done, (see s. 90,) the depositions, if evidence at all under the statute, must be conclusive. By s. 92, they are made conclusive evidence in actions by assignees for any debt or demand for which the bankrupt might have sued, unless such notice to dispute

CHAMBERS 9.
BERNASCONI and Others.

1834.
CHAMBERS
v.
BERNASCONE and Others.

is given. [Patteson J. Sect. 96., which enacts, inter alia, that no adjudication in bankruptcy by the commissioners shall be evidence until entered of record, and that every such instrument shall be so entered of record on application of any party interested, and that the Lord Chancellor may on petition direct the involment of any depositions or other matter relating to commissions of bankrupt, does not make that involment imperative, though necessary to their being produced in evidence under the other provisions of that section.] The fact that these assignees inrolled the depositions in question, does not of itself make them evidence against them, that being done in pursuance of the act, in order to have that evidence ready for themselves to support the commission, if it should be afterwards desirable to produce it. This cause was pending before the passing 2 and 3 Will. 4. c. 114. s. 7., by which, in event of the death of any witness deposing to the petitioning creditor's debt, trading, or act of bankruptcy, assignees or persons claiming through or under them, or acting by their authority, in such cases only where they claim, maintain, or defend some right, title, interest, claim or demand, which the bankrupt might have claimed, maintained, or defended, in case no commission or fist had issued, may give in evidence, in support of a commission or fiat, any deposition of such deceased witness relative to such act of bankruptcy &c., which has been duly inrolled, and is therefore excluded from its operation. The enactment of 5 Geo. 2. c. 30. s. 41, omitted in 6 Geo. 4. c. 16. s. 92., was then replaced, but even that section excludes the depositions on both sides in actions not within its purview.

On the second point, to admit the argument for the plaintiff, that the certificate of a public functionary written by him in the course of office, on a subject within his knowledge, and, as far as can be afterwards ascertained, without any interest on the subject, may be given in evidence after his decease, would be to dispense with the primary rule that rights can only be bound by evidence given under the obligation of an oath. The contents of every countinghouse would be evidence after the decease of clerks sent to witness mercantile transactions. Again, letters and statements collected by an historian in the course of his employment to write a history of the times, would be evidence of the facts there detailed. exception to the rule hitherto introduced has turned on the question, whether the necessities of mankind have justified a departure from it in this particular case only. Thus in Mr. Tyrwhitt's report of the present case (a), Lord Lyndhurst says, "Suppose non est inventus had been returned by the sheriff, this memorandum would not have been evidence in an action against the sheriff. Many entries are inadmissible in evidence though against the interest of the maker. Thus, on a question whether a man had been tried or convicted or not, a letter in which he confessed it could not be admitted" (b). Bayley B. added, "The excepted case is where a subscribing witness to a deed admits on his death-bed that it was forged." And he afterwards appears to doubt whether such a certificate would even prove the fact of arrest. If the certificate be evidence of the time and place of arrest, all other circumstances attending it would be evidence, if placed in the certificate by the officer without apparent interest, e. g. an acknowledgment of debt, retainer, &c. made to him by the defendant. But the principle of the decided cases is contrary. For, where a deceased steward charges himself in a rental with a receipt of rent, the evidence is not confined to the fact of payment of rent, but embraces the whole entry. Thus, if it

1834.
CHAMBERS
v.
BERNASCONE and Others.

⁽a) Ante, Vol. I. 341.

⁽b) Rex v. Castell Careinion, 8 East, 77, and 11 East, 309.

1834.
CHAMBERS
v.
BERNASCONE
and Others.

state a receipt of rent from A. "tenant of a certain manor," it is evidence as the res gesta itself that A. paid it on that account, but nothing added by the steward as to the occasion of the payment would be Higham v. Ridgway(a) goes to the admissible. extreme point, as appeared to be Lord Eldon's opinion in Barker v. Ray(b). Warren v. Grenville is explained by Lord Mansfield in Goodtitle v. Duke of Chandos (c) thus: "A receipt had been given on the bill which contained the articles for drawing and ingrossing the surrender, so that there was positive proof of an actual surrender. In Doe v. Robson, and Warren v. Grenville, items of charges in attornies bills for business done which had been paid for, were admitted in evidence after their deaths, to prove when the work was done, the desired inference being that it must have been done before it was so paid for. Highan v. Ridgway, the case of a man-midwife's entry, is a similar case, resting on like grounds. Hagedorn v. Reid (d) is a doubtful decision, which might however stand on other grounds, so that it was never necessary to review it in banc. In Champneys v. Peck (e), an undefended cause, it does not appear what further evidence was adduced. If the plaintiff proved an admission by the defendant that he had received the bill without saying when, and the defendant did not prove the receipt of the bill at any other time, the indorsement by the deceased clerk on the duplicate bill might be primâ facie evidence of its due delivery. The judgment of Lord Tenterden in Doe v. Twyford, must be taken with reference to all the circumstances, and Taunton J. expressly rests his opinion on the facts corroborating the memorandum. The entry of a de-

⁽a) 10 East, 109. (b) 2 Russ. R. 53; see 1 Stark on Ev. 317.

⁽c) 2 Burr. 1072. (d) 3 Camp. 337; 1 M. & S. 567, S. C.

⁽e) 1 Stark, C. N. P. 404.

ceased clerk may be an important link in a chain of other circumstances admitted to be true. In Salte v. Thomas (a), prison books were admitted to prove the time at which an imprisonment begun, but not the cause of it. If this is evidence at all to prove the time of arrest, it is not admissible to prove the place at which it happened.

1834.

CHAMBERS

v.

BERNASCONI
and Others.

The Attorney-General in reply. Assignees who accept that appointment without being bound to do so become privy to the adjudication and to the previous depositions on which it proceeded. Here, they have also authenticated them by solemn inrolment. second point, the entries in Warren v. Grenville and Doe v. Robson being made without interest, did not require or receive authenticity from the subsequent acknowledgments of payment, but were admitted on the general principle stated by Lord Ellenborough in Doe v. Robson; nor does the argument that the work must be taken to have been done before the bill was paid, affect those cases. In Higham v. Ridgway no date is affixed to the entry of "paid," nor did the date of the payment in Warren v. Grenville In Doe v. Robson payment seems to have appear. been proved dehors the entry admitted in evidence. Lord Eldon, in Barker v. Ray, speaks of parol declarations as in Davies v. Pierce (b), Uncle v. Watson (c); not of contemporaneous written entries coming from a proper custody, which are of a very different nature and preclude perjury. [Lord Denman C. J. No extrinsic evidence was given in Higham v. Ridgway that the entry in the book was contemporaneous with the event.]

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. This action was brought by a person who (a) 3 B. & P. 188. (b) 2 T. R. 53. (c) 4 Taunt. 16, &c. 1834.
CHAMBERS
v.
BERNASCOMI and Others.

had been declared a bankrupt, against his assignees, in order to dispute the validity of his commission. On the trial it became necessary to inquire whether the plaintiff had been arrested in a particular place (South Molton Street), on the 9th of November 1825, by one Wright a sheriff 's officer, who died before the trial, accompanied by a person named Brett. To prove that the plaintiff had been so arrested, he tendered evidence of two descriptions, both of which the chief baron refused to receive. A bill of exceptions was thereupon tendered, and the question was argued on the 9th of May before this court of error. The first head of the evidence rejected consisted of depositions made by the two deceased persons on opening the commission against the plaintiff, which had been inrolled of record in the court of Chancery by the defendants as assignees.

It was contended that they were admissible against the defendants: first, by reason of some supposed privity between them as assignees, and the petitioning creditor who must have brought forward the depositions, and to whom the defendants were said to have attorned by acting under the commission: and, secondly, because the assignees had substantially affirmed the truth of the depositions by causing them to be inrolled, and so making them evidence. But no decision or dictum was cited in favour of this attempt; no instance was ever cited of such evidence being tendered, often as it must have been desirable: and we think the admission of it could not be justified by any principle of law.

To prove the same fact the plaintiff tendered a certificate written and signed by Wright, the deceased sheriff's officer before mentioned, stating in terms that he arrested the plaintiff on the day in question in South Molton Street, at the suit of one Brereton. The tender of this certificate was preceded by proof that it

Middlesex to require a return in writing of the arrest, and of the place where it is made, under the hand of the officer making it, that the certificate tendered was annexed to the writ issued against the plaintiff on the 5th of November 1825, at the suit of Brereton, of which writ Wright had the execution. The under-sheriff also proved that he could not return a defendant not arrested when he had got a similar certificate of arrest. The writ and the certificate were produced by the ander-sheriff. Whether this certificate is evidence of the arrest having been made at the place named in it, a the question which we are now to decide.

CHAMBERS

U.
BERNASCONS
and Others.

The ground on which the attorney-general first rested nis argument for the plaintiff in error was not much relied on by him, viz. that the certificate was an admission against the interest of the party making it, because it renders him liable for the body arrested. He had recourse to a much broader principle, and laid t down as a rule, that an entry written by a person leceased in the course of his duty, where he had no nterest in stating an untruth, is to be received as proof of the fact stated in the entry, and of every circumtance therein described, which would naturally accompany the fact itself.

The discussion of this point involved the general principles of evidence, and a long list of cases determined by judges of the highest authority, from that of Price v. Lord Torrington, before Holt C. J., to Doe 1. Patteshall v. Turford, recently decided by Lord Tenterden (a) in the court of King's Bench. After arefully considering, however, all that was urged, see do not find it necessary, and therefore think it rould not be proper to enter upon that extensive argument; for as all the terms of the legal proposition above laid down are manifestly essential to render the

CHAMBERS
v.
BERNASCONI and Others.

certificate admissible, if any one of them fails, the plaintiff in error cannot succeed; and we are all of opinion, that whatever effect may be due to an entry made in the course of any office reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances. Admitting then, for the sake of argument, that the entry tendered was evidence of the fact and even of the day when the arrest was made (both which facts it might be necessary for the officer to make known to his principal), we are all clearly of opinion that it is not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done. Judgment for the defendants.

IN THE EXCHEQUER OF PLEAS.

Howell and Another, Assignees of John Waters and David Jones, Bankrupts, surviving Partners of Robert Waters, deceased, against William Jones.

The following guarantie was given by the defendant in Jan. 1825 to

A SSUMPSIT. The first count of the declaration stated, that whereas heretofore, in the lifetime of the said *Robert*, and before the bankruptcy of the said

certain bankers:—" Please to open an account with, and honour the cheques of H. B. on Mill account, for whom I will be responsible." The account having been opened, the bankers made advances to H. B. from time to time till Feb. 1827, when they ceased. A large balance was then due to them from H. B., who in October of that year paid a sum into the bank on account of it. In Feb. 1828 the bankers took an acceptance from H. B. at three months for the balances of his account with interest, without the defendant's knowledge. In several previous instances the bankers had taken similar acceptances from customers who had overdrawn their accounts; but though the defendant had been consulted by them as their attorney on the dishonour of several of them, it was not shown that he was aware of the practice of the bank in that particular:—Held, that the taking the acceptance from the principal debtor by the parties guaranteed, without the knowledge or assent of the surety, was a giving time to the principal, which altered the situation of the surety, and therefore discharged him from liability on the guarantie.

John and David, to wit, on 4 January 1825, and from thence until and at the time of the death of the said Robert, they the said Robert, John, and David, were carrying on the business of bankers in co-partnership, to wit, in the county of Carmarthen, and afterwards, and in the lifetime of the said Robert, and before the bankruptcy of the said John and David, to wit, on &c. in &c., in consideration that they the said Robert, John, and David, at the special instance and request of the said defendant, would open an account with and honour the cheques of one H. Bowers, on a certain account, to wit, an account, to be called the Mill account, he the said defendant undertook, and then and there faithfully promised the said Robert, John, and David, to be responsible to them for him the said H. Bowers. ment, that the plaintiffs, confiding &c., did then and there, in the lifetime of the said Robert, and before the bankruptcy of the said John and David, open an account accordingly with the said H. Bowers upon the said Mill account, and did afterwards, to wit, on the day and year aforesaid, and on divers other days in the lifetime of the said Robert, and before the bankruptcy of the said John and David, to wit, on &c. honour divers cheques of the said H. Bowers, on the said Mill account, and did, at those respective times, pay and advance to and on account of the said H. Bowers, in respect of the said cheques, and otherwise on the said account, divers sums amounting to 2000l., and exeeeding by 10001. all the monies paid to, and had and received by the said Robert, John, and David, by and from and on account of the said H. Bowers, to wit, on Averment, that the said H. Bowers, although often requested so to do, has not paid the said lastmentioned sum of money, or any part thereof, to the said Robert, John, and David, or any or either of them, in the lifetime of the said Robert, and before the bankruptcy of the said John and David, or to the said

Howell and Another v.
Jones.

Howell and Another v. Jones.

John and David, or either of them, after the death of the said Robert, and before their bankruptcy: By reason of all which said several premises, the said Henry was indebted to the said John and David, after the death of the said Robert, and at the time of their bankruptcy, to wit, on 31 December 1831, in the sum of 1500l., in respect of the said account so opened, and of the said several cheques so honoured as aforesaid. Averment, that he the said Henry has not at any time since the bankruptcy of the said John and David, paid the said last-mentioned sum of money, or any part thereof, to them the said plaintiffs, as such as signees as aforesaid, or to either of them, although often requested so to do; of all which premises the said defendant afterwards, to wit, on 1 September 1833, had notice, and was then and there requested by the said plaintiffs to be responsible to and indemnify them the said plaintiffs as such assignees as aforesaid, for and in respect of the said sum of money last mentioned, according to the said promise and undertaking by him in that behalf, in manner aforesaid: Yet the said defendant, not regarding &c., has not as yet been responsible to or indemnified the said plaintiffs' assignees as aforesaid, for or in respect of the said sum of money last mentioned, or any part thereof, although often requested so to do, but has wholly refused, and still does refuse so to do, and the said last-mentioned sum of money still remains wholly due and unpaid to the said plaintiffs' assignees as aforesaid. Counts for money paid, on a promise to John and David as surviving partners, and on an account stated with the assig-Pleas: general issue, and actio non accrevit infra sex annos.

The plaintiffs' particulars of demand stated the action to be for 1083l. 18s. 11d., with interest from 31 December 1832 to the time of payment.

At the trial at the last Carmarthenshire assizes, beore Gurney B., the following facts appeared:—Waters
and Co. had carried on business as bankers at Carnarthen for many years. Before January 1825 their
firm consisted of Robert and John Waters and David
Jones, of whom Robert Waters died in 1828. The
narviving partners then took Mr. A. Jones into the
firm, and carried on business to January 1832, when
hey stopped payment, and a fiat issued against them
n July, under which the plaintiffs were appointed asignees.

Howell and Another v.
Jones.

In 1825 Waters and Co. permitted one H. Bowers, miller, to open an account with them, on his procurng them the following guarantie from the defendant, William Jones, who was an attorney, carrying on business at Carmarthen, the legal adviser of Waters and Co., and having large deposits in their hands.

Henry Bowers, Mill account.

Messis. Robert Waters and Co.

Please to open an account with, and honour the cheques of Mr. Henry Bowers, on Mill account, for whom I will be responsible.

W. Jones.

Carmarthen, 4 January 1825.

This guarantie was given by the defendant, who attended at the bank with Bowers, and in consequence Waters and Jones received deposits as bankers, on account of Bowers, and made him sundry advances in cash, and by honouring his cheques till 8 February 1827 inclusive. From that day to 31 December 1832, no other advances were made by them to him, but on 30 October 1411. 10s. 9d. was paid to them on the credit of the balance then standing against him; 8461. 14s. 7d. still remained due. On 31 December 1826 it was 10371. 16s. 4d. against him. On 30 October 1827

Howell and Another v.
Jones.

he paid 141l. 10s. 9d. on account of the balance then due. On 31 December 1827 it was 846l. 14s. 7d. against him. On 30 June 1828, it was, with interest, 870l. 0s. 9d. Interest was afterwards regularly charged accordingly. On 31 October 1828, the balance was 891l. 16s. 11d.

When accounts were much overdrawn it had been in several cases the practice of Waters and Co. (as well as of a neighbouring bank) to require acceptances from their customers for the balances appearing due on the accounts; thus forming what were called "covers" for them. This was done in order to remit them to the London bankers, to prove the amount due, without its being intended that the drafts should at maturity bepaid. The defendant being confidential legal adviserto the bankers, had been consulted by them upon cases of similar acceptances, when dishonoured, which they said were taken by them for cash balances, but whether before or after the guarantie in question did not appear. Nor was he shown to have been person ally acquainted with their practice in that respect, our that the dishonoured bills had been taken in pursuance of it. On February 26, 1828, Waters and Cohaving called on Bowers for such a "cover," he gave them the following acceptance, without the knowledge of the defendant.

£846: 14s. 7d.

Carmarthen, February 26, 1898.

Three months after date pay to our order, in London, 846l. 14s. 7l. value received.

To Mr. Henry Bowers.

R. Waters & Co.

Accepted, at Messrs. Barclay and Co. bankers, London.

Henry Bowers.

Bowers's account was credited with this bill; it was

returned dishonoured. The writ in this action was issued upon it 25 October 1833. The plaintiffs had a verdict for 10271. 6s. 1d. for principal and interest due, subject to a motion for a nonsuit, on two points taken at the trial. First, that the defendant being a mere surety was discharged by the bankrupt's having taken the acceptance in question, by which extension of credit time was given to the principal. Secondly, that the plaintiff's action on the note was barred by the statuate of limitations (a).

Howell and Another v.
Jones.

Evans having obtained a rule in Easter term, calling on the plaintiff to show cause why the verdict should not be set aside, and a nonsuit entered,

Whitcombe, Follett and Powell showed cause. The first point, viz. that the surety was here discharged by giving time to the principal, is of general importance. This is not the case of an ordinary guarantie for securing a specific debt, but it is a continuing guarantie for advances to be made to a person with whom bankers are on its security to open and keep an The usual manner of carrying on that account by those bankers with their customers must have been then contemplated by the parties. There is evidence that the defendant knew that it was a usual habit, if not a general practice, of their bankers to take acceptances from their customers, as collateral securities or covers for the balance of overdrawn ac-[Alderson B. All you can assume is, that the defendant knew that in some instances they did.] Taking it that he did not know it as a general usage, it must be taken that the surety informed himself, at the time he gave the guarantie, of the usual mode of

⁽a) Another point taken at the trial was not further insisted on.

Howell and Another v.

Jones.

dealing with customers then adopted by the bankers who were to be secured. That may be gathered from Combe v. Woolf (a). He in fact undertook to guarantie advances made under the usual terms as to credit, no conditions to the contrary having been imposed at the time of giving the guarantie. He might have insisted that he was discharged, by any abridgment in the case of his principal, of the credit usually allowed to similar customers. Then how can he now complain that the bankers have dealt with his principal in the manner they did with their other customers? [Aderson B. The test of the case is, whether the taking this acceptance by the bankers placed the defendant in a different situation. Now, had he come to them afterwards, stating the doubtful solvency of his principal, and pressing them to get the debt from him s soon as possible, their answer must have been, that they had precluded themselves from suing him for three months, by taking his acceptance, while they might otherwise have sued immediately.]

These bankers, by taking this acceptance after the security given, did not alter the situation in which the surety had a right to expect himself to be placed when he gave this guarantie. In Combe v. Woolf the guarantie contained no stipulation as to the credit to be given, nor does it appear that the plaintiffs might not have sued for the price of the porter sold before it reached its destination. That surety's judgment of his situation, at the time of giving the guarantie, could only have turned on his actual knowledge that eight months credit was usual. The court assume he had that knowledge, by having informed himself of the course of dealing. [Alderson B. That case did not decide that the surety would be discharged if he knew of the credit usually given, but that where more credit

1834. Howell JONES.

than usual was given, the surety was discharged, because his situation was altered. It was not necessary that the court should assume that he had actual knowledge of the and Another credit, for it was extended beyond the usual period, and was therefore immaterial in the suit. But whether the court assumed it because it was the practice of the house, or because the surety knew it or was admitted to know it, is immaterial to the judgment of the chief justice.] In all the cases in equity in which a surety has been discharged on account of time given to the principal, the time was given after the guarantie had been entered into, and in a manner not contemplated at the time of giving it. That was an act without the surety's consent. In Lewis v. Jones (a), Holroyd J. says, "The extinguishment of the debt puts an end to the agreement of the principal and surety." Now this guarantie being open and general without limit, the defendant was liable for all advances made to Bowers till he gave notice to the contrary. The taking Bowers's acceptance neither extinguished the debt or added to its existence beyond the period intended by the guarantie, for the bill was not intended to be sued on at maturity, but to lie at the London bankers till that time. v. Edwards (b) shows, that want of notice to or knowledge by a surety of vain applications for payment made to the principal after the guarantie given, affords no answer to an action; and Gaselee J. adds, that it is the duty of a surety to go and inquire into the state of the transactions between his principal and the parties guarantied.

On the second point, whether the plaintiffs are barred by the statute of limitations, the responsibility of customer and surety are co-extensive. Now as the bankers had a clear remedy against the principal on the 26 February 1828, when the bill was taken for the ba-

(a) 4 B. & Cr. 506.

(b) 6 Bing, 94.

Howell and Another v.
Jones.

lance of the account, the statute has not operated, and their remedy against the surety remains.

John Evans and E. V. Williams contrà. transaction shows, that the business of these bankers was irregularly conducted, without disclosing any thing amounting to a custom of trade or course of dealing. The account was opened early in 1825, but though balances were taken on 31 December in that and the two next years, and were on each occasion against the customer, no bill was required from him to cover the account till February 1828. The whole evidence on the subject amounted to this, that the bankers sometimes took a customer's acceptance for the balance of an overdrawn account, if, being satisfied of his solvency, they could deposit it as a security with the London bankers. But if they might postpone taking a bill till the fourth year of the account, they might renew it for an indefinite period, or might suffer the account to stand over, and by taking a bill after twenty years had elapsed oust the surety of the benefit of the statutes of limitation.

It has been argued that nothing has here occurred amounting to a giving of time. Now in Samuel v. Howarth(a), Lord Eldon thus lays down the rule between principal and surety, after premising that the same principles which have been held to discharge the surety in equity, will operate to discharge him also at law:—"The rule is this, that if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety; that is, if time is given by virtue of positive contract between the creditor and the principal, not where the creditor is merely inactive; and in the case put, the surety is held to be discharged, for this reason, because the creditor, by so giving time to the principal, has put it out of the power

Howell and Another v. Jones.

of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he in fact cannot have the same remedy against the principal as he would have had under the original contract." Now if a surety is for a moment deprived of his remedy against his principal, by the act of the party guarantied, in giving him time for payment, he is dis-Then, had this defendant the same remedy against Bowers after his acceptance was taken by the bankers as he had before? That acceptance extended the time to which the guarantie applied, without leaving it in the surety's power to put an end to it; for he might previously have called on the bankers to procure immediate payment of the balance due, or, having paid it to them, might have instantly sued the principal; but, whereas, after this acceptance taken, the bankers could not sue the customer for three months, and the defendant's situation was altered. [Alderson B. Beyond what period was credit here given? No period of credit is given, then what is a "giving time?" If there was originally an express contract between Bowers and the bankers that this bill should be given at three months by way of cover, it is hard to say that time was given.] There is no evidence that the bankers were obliged to give three months credit whenever a balance was due from their customers. Here it was not given on the stating the last balance on 31 December 1827, or till February 1828.

On the second point, the statute began to run from February 1827, when the bankers refused to make any further advances to Bowers; for the "mill account" to which alone the guarantie applies, was then closed, and the subsequent liability of Bowers, on his acceptance given 26 February 1828, had no reference to the guarantie. Again, the payment by Bowers in October 1828, in part of the bankers' demand, will

Howell and Another b. Jours.

not take the case out of the statute as against the surety, for it was made by him as the principal debtor, and not as a joint contractor with this defendant, so that Whitcomb v. Whiting(a) and Burleigh v. Scott(b) do not apply.

Cur. ado. vult.

The judgment of the court was afterwards delivered by

BOLLAND B.—This was an action brought against the defendant to recover the balance of an account due from one *Bowers* to the plaintiffs, and for which the defendant had given a guarantie in writing. The guarantie was dated 4 January 1825, was signed by the defendant, and was as follows:—

" Messrs. Robert Waters and Co.

Please to open an account with and honour the cheques of Mr. Henry Bowers, on Mill account, for whom I will be responsible.

W Ima"

Under this guarantie the plaintiffs proceeded to make advances as bankers to Bowers, and at the close of 1825 the balance due from Bowers to them amounted to 7541.; at the close of 1826, to 10371.; at the close of 1827, to 8461. Subsequently to February 1827, no fresh advances were made by the plaintiffs to Bowers, but on 30 October 1827, a payment of 1411 was made by him to the plaintiffs. For the balance thus remaining due to the bankers at the close of 1827, they in February 1828, without the knowledge or assent of the defendants, took an acceptance of Bowers, payable three months after the date thereof.

The question now for the consideration of the court is, whether by so doing they have discharged the present defendant from his liability as guarantic for the

(a) Dougl. 652.

(b) 2 B. & Cr. 20.

debt of Bowers? The case of Combe v. Woolf (a) establishes that a plaintiff who, without the knowledge or assent of the surety, "gives time" to the principal debtor by a contract made for that purpose between them, thereby exonerates altogether the surety from his liability. But the real question is, what is meant by "giving time." We think it means extending the period at which, by the contract between them, the principal debtor was originally liable to pay the creditor, and extending it by a new and valid contract between the creditor and the principal debtor, to which the surety does not assent. In the case above cited, the surety undertook to guarantie a contract in which the debtor was to have eight months credit; and was exonerated by the fact, that the creditor had bound himself, by taking a bill, to give eleven months credit for the balance due. In Orme v. Young (b), Lord C. J. Gibbs puts it thus: "What is forbearance and giving time? It is an en sagement which ties the hands of the creditor. negatively refraining—not exacting the money at the time," (by which of course he means at the time when due by the contract between the principal and the creditor,) " but it is the act of the creditor depriving himself of the Power of suing by something obligatory, which prevents surety from coming into a court of equity for relief, because the principal having tied his own hands the surety cannot release them." If, however, the creditor continues to deal with the principal debtor on the origival terms of the contract between them, he cannot, we think, by any length of credit which he so gives, be properly said to "give time" to the debtor. The time must be given as an extension of the original credit. If, therefore, it could be shown in fact that the taking the three months' bill in this case, in February 1828, from the principal debtor, was part of the original contract be-

Howell and Another v.
Jones.

Howell and Another v.
Jones.

tween the plaintiffs and Bowers, for which the defendant became the guarantee, there would be much force in the arguments addressed to the court on the part of the plaintiffs, that the defendant was bound to know the nature of the contract which he guarantied, and that the course of dealing between plaintiffs and Bowers might be properly referred to for that purpose. giving them the full benefit of that argument, it is disposed of by the facts of the case. Here a balance is struck in 1825, and no bill taken; the same takes place in 1826 and in 1827, at which period all advances ceased. on the part of the plaintiffs. It cannot be for a moment doubted, upon the facts appearing on the learned. judge's report, that in February 1827 an action coul have been maintained against Bowers for the balances then due. So again, in October 1827, after the pay ment of 141l. by Bowers, no one can doubt that the bankers could have maintained an action immediatel for the then balance, either against Bowers or in failur of payment by him against the defendant. Then after this, by an agreement to which defendant is not priv or an assenting party, the plaintiffs bind themselve not to sue Bowers for that balance during the period between February 1828 and May 1828. this was clearly such a giving time to the principal debtor, as completely to exonerate the surety from all subsequent liability. This renders it unnecessary to discuss the second objection.

The rule therefore for entering a nonsuit must be made

Absolute.

1834.

NATION against Tozer and Underhay.

THE plaintiff obtained a verdict in this case at the An action was last summer assizes for Somersetshire, before Patteson J., with leave to the defendant to move to enter persons, being the executors a nonsuit. A rule having been obtained accordingly,

Erle, for the plaintiff, showed cause in last term, and

Barstow supported the rule for the defendants.

The court took time to consider. The pleadings that it did no and facts are so fully detailed in the judgment that enure as that their insertion appears unnecessary.

PARKE B. now delivered the judgment of the court.

—This case was argued before myself and my brothers sumpsit for use and occupation.

Bolland, Alderson, and Gurney, during the last term, tion.

when cause was shown against a rule to enter a nonsuit. The case was tried before my brother Patteson at the last summer assizes for Somersetshire, when a verdict was found for the plaintiff, with leave to move to enter a nonsuit.

The two first counts, which were upon a special promise to surrender a certain dwelling-house to the plaintiff; and a third count, which was for double rent claimed to be due from the defendants for holding over, were not proved. The question arose on the fourth count, which was for use and occupation, to which there was a plea of the general issue, and also a special plea that the defendants ought not to be charged otherwise than as executors of W. H. Toser, the lessee for years, at the rent of 48l., because the messuage was of much less annual value, and they had derived no rent or

brought against two the executors of a deceased termor, for the use and occupation by them of the demised premises; an entry and occupation by one was The pleadings proved. Held, of both, so as to make them jointly liable de bonis proNATION
v.
Tozer
and Another.

profit from the demised premises, and had fully administered his effects. To this special plea there was a replication that the defendants withheld possession, and did not offer to deliver up the demised premises at any time before the rent in question accrued due, or give notice that they were ready to do so, or that they had not any effects to be administered (a); and the rejoinder averred that they did give notice, and offered before the rent became due to give up the demised premises, and did not withhold possession.

Upon the trial it appeared that Mr. W. H. Tozer in his life-time was tenant to the plaintiff by a demise not under seal, dated 29th January 1830, for seven years; that both the defendants were his executors, and acted in that capacity, but the defendant Underhay alone entered and took possession, and no notice to quit or unconditional offer to give up the possession was proved until after the rent claimed became due; the issue therefore on the rejoinder to the special plea was properly found against the defendants, and the only question was, Whether both defendants were liable in their individual characters on the count for use and occupation.

The learned judge was of opinion, upon the trial, that the entry of one was the entry of both, so as to charge both in this form of action, but reserved the point for the decision of the court.

Upon consideration, we think that the entry of, and occupation by, one executor, is not sufficient to render the other liable, and that without an entry and occupation this form of action is not maintainable against the other executor.

There is no doubt but that several executors have a joint and entire interest in and authority over all the goods of the testator, including chattels real; Comyns's

(a) See Reid v. Lord Tenterden, ante, 111.

NATION
v.
Tozer
and Another.

1834.

est, tit. Administrator (B. 11). In Bacon's Abridgt, tit. Executors and Administrators (D.), it is laid n, and rightly, that the acts done by any one of n which relate either to the delivery, gift, sale, ment, possession, or release of the testator's goods. deemed the acts of all. The act of one, in disposing the testator's effects, is the act of the other to give idity to the disposition and to preclude him from aiding it; and the act of one in possessing himself the effects is the act of the other, so as to entitle to a joint interest in possession, and to a joint right ection if they are afterwards taken away. stion is, whether the act of one, in taking possession chattel real or personal of the testator, can create w liability and impose a charge on the other per-Ilv and in his own individual character, which tout such act would never have existed? and we k it cannot.

Margthorpe v. Milforth (a) the court says, "the of one executor shall not hurt the other for his 1 goods." And again, "where they shall be charged a the goods of the testator, the nonsuit, release, or r act of one shall bind the other, but not if they U be charged of their own goods; 11 H. 4, 69." f one executor takes possession of and uses a peral chattel, the other is not liable to the creditors for h act of his co-executor."—So if one executor enter lenjoy the land demised, and take the profits bed the rent, the other executor would not be chargee with the amount as assets to the creditors; the who actually received would alone be responsible. n respect then to the creditors, the actual possesand use by one is not in law the possession and by both, so as to attach a liability upon both; and sems to us that if instead of disposing of the term, NATION
v.
Tozer
and Another.

one of the executors takes the actual possession of and enjoys the land demised, such enjoyment is not by law the possession and enjoyment of both, and it does not render both chargeable to the lessor to pay a compensation to him for it as joint occupiers in their own right.

But in order to support this action for use and occupation, it is necessary that the land should have been occupied by the defendant, his agents or under-tenants, during the time for which the compensation is claimed for use and occupation, though it need not have been beneficially or even actually so enjoyed, but the defendant must have taken possession and continue to have the right of actual occupation whenever he pleases to take it.

Thus, where an interesse termini never took effect as a lease, the lessee not having entered, the action was held not to be maintainable; Edge v. Strafford (s). So in Naish v. Tatlock (b), where there was an agreement to pay rent annually, and the tenant occupied for a part of the year till he became bankrupt, and his assignees for the remainder, till the rent became due, it was held, that though the latter might be liable to an action of debt for the whole rent which became doe after the assignment, they were not liable in an action for use and occupation, except during the time that they occupied; and Eyre C. J. said, "that the remedy given by the statute 11 Geo. 2. c. 19. was in its own nature not co-extensive with a contract for rent, nor did it seem to have been within the scope and purview of the act to make it co-extensive with all the remedies for the recovery of rents claimed to be due by the mere force of the contract for rent, but that the statute meant to provide an easy remedy in the simple

⁽a) Ante, Vol. I. 293.

⁽b) 2 Hen. Black. 319.

1834.

NATION

TOZER

and Another.

case of actual occupation, leaving other more complicated cases to their ordinary remedy.

In the case of Bull v. Sibbs (a) there was an actual occupation by the under-tenant of the lessee. In Baker v. Holtzapffel (b) there was an occupation by the lessee till the premises were burned down, and then as much occupation as the lessee chose to make use of. So in the cases put by C. J. Gibbs, 5 Taunton, 519; and by Lord C. J. Abbott, in 2 Starkie's Nisi Prius Cases, 527; where the lessee had taken possession and had the power of actually occupying when he pleased.

But in the present case the defendant *Tozer* has never occupied by himself, and if the occupation of the defendant *Underhay* does not affect him, he has never occupied at all. We therefore think he is not liable at all in this form of action.

We do not say whether he might or might not be liable jointly with his co-executor in their own right, even without entry by either, to an action of debt for rent accruing due after the testator's death, as the term vested in both by operation of law, (for after accepting the executorship neither of them could waive the term, and the liability to pay rent is incident to the term). All we decide is, that he is not liable to an action for the use and occupation of that of which neither he, nor any one whose act is in point of law his act, has been in the actual possession.

For these reasons we think that the rule must be absolute to enter a nonsuit.

Rule accordingly (c).

⁽a) 8 T. R. 327.

⁽b) 4 Taunton, 45.

⁽c) See Reid v. Lord Tenterden, ante, 111, and Tremeere v. Morison, 1 Bing. New Cases, 89, subsequently reported; Rubery v. Stevens, 4 Bar. & Adol. 241.

1834.

GREENSLADE against TAPSCOTT.

A lessee covenanted to pay an additional rent for every acre, and so in proportion for a less quantity of he should " suffer to be occupied " by any other person without the consent of the landlord. mitted his labourers to potatoes on small portions of the land demised between harvest according to the custom of the country. Held, that he was liable to pay the additional rent, though the lease contained a covenant should use dress and manure the land, according to the custom of the country.

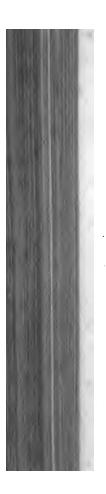
SSUMPSIT on an agreement bearing date 4 July 1828, by which the plaintiff agreed to let and the defendant to take "the estate at Pariton, then in the occupation of J. and T. Rew for seven years from the 29 September then following, the lease to be drawn in the land which the precise terms of the lease then existing dated 1 December 1823, from Joanna Lyddon and the plaintiff, to the said Messrs. Rew, for five years thence ensuing, with some exceptions mentioned." Several breaches were assigned in the declaration, but that in question arose The lessee per- on a stipulation in the former lease, "that the said J. and T. Rew should yield and pay yearly during the said raise a crop of term, in addition to the said annual rent of 851, unto the said plaintiff, the further yearly rent of 10% of lawful British money for every acre (a), and so in proportion for any less quantity of any part of the premises which and seed time, he should let, assign, or demise, or suffer to be occupied by any other person, without the consent in writing of the said plaintiff first obtained." There was another covenant "that the said J. and T. Rew would not commit waste," but, "on the contrary, use, occupy, dress, and manure the premises in manner aforesaid, and according to the custom of the country and rules of good husbandthat the tenant ry." Breach, "that the said defendant, during the cor-"and occupy," tinuance of the said term, to wit, on 25 March 1833, did let and demise to certain persons, and did suffer to be occupied by such persons from the day and year last aforesaid, up to and until the 29th day of September in the year last aforesaid, divers, to wit, three acres of land, parcel of the said premises, in certain parts and proportions, by such persons respectively, that is to say, (describing the quantities occupied by each,) without

1884.
GREENSLADE
v.
TAPSCOTT.

the consent in writing of the said plaintiff first obtained;" whereby, &c. The second count laid the demise as a tenancy from year to year, subject to the same terms. Plea: general issue. At the trial before Williams B. at the last assizes for the county of Somerset, it appeared that the portions in question were let out in patches to persons in the neighbourhood for potatoes, who gave up the occupation after that crop was got in, and wheat was then sowed by the defendant. was given to show that it was the custom of the country for farmers to prepare their land for the next crop, and then permit their labourers to raise a crop of potatoes on it before the seed time. The learned baron, in addressing the jury, said, that when parties enter into any precise contract, the custom of the country is not applicable to such cases, except as to that which is not in the contract. That as it was proved that a certain rent was paid for a certain portion of the premises for potatoes, there was, in his opinion, a clear breach of that agreement. The jury found a verdict for plaindiff on this breach with 151. damages, the increased rent for three acres. Coleridge Serjt. having obtained a rule for a new trial on the ground of misdirection,

Follett (Wilde Serjt. with him) showed cause. The defendant suffered the land to be occupied by other persons without the consent in writing of the plaintiff. The parties plant potatoes and take the crop, and during that time the land is in the occupation of the party whose crop it is; he could bring trespass during such occupation. [Parke B. If I pass over part of the field where the potatoes were, though I do not tread on them, the person to whom the crop belonged would be the party to sue. Alderson B. The parties might have gained a settlement by such occupation (a).]

⁽a) Under 13 & 14 C. 2. Rex v. Brampton, 4 T. R. 349.



it was shown that a clerk had lodged there fo month, in a room of which he had the exclus sion; Lord Ellenborough held, that the cove only apply to such an underletting as a licence expected to be applied for (b). [Parke B.] sion is equivocal in that case, it is "that he in the room:" if a stranger had broken in, h have maintained trespass.] The principle Laming applies here; many strong words in are often construed, not literally, but accord intent of parties. A tenant's depositing a his landlord, a brewer, as a security for suppli is not a breach of covenant not to assign wise part with the premises demised" or Doe d. Pitt v. Hogg(c). Here we learn th tom of the country was for the landlord to land, and allow his labourers to put in pot cleansing crop between his two grain crop bourers had nothing to do with the land, 1 put in the seed and drew the crop. shown by the subsequent stipulation, that t ant is to occupy according to the custom of Dyer, fol. 15, pl. 79, has this pas every deed and condition, which are pr between party and party, a reasonable

intention shall be construed, however the word may sound to a contrary understanding."

1834.

GREENSLADE

v.

TAPSCOTT.

PARKE B .- This is a breach of the agreement. The stipulation is in extensive terms, that "for every acre, and so in proportion which the defendant should let. assign, or demise, or suffer to be occupied by any other person," he engaged to pay an increased yearly rent of Perhaps it would not fall within the agreement not to let, assign, or demise; but here the words are, shall not "suffer to be occupied." It is impossible to say that this use of the land by the parties does not fall within that description. If trespass was committed on the land, this occupier would be the person to bring an action, and he might gain a settlement by such possession. As to the cases cited, Doe v. Hogg is distinguishable. It may be difficult to distinguish the present case upon principle from what Lord Ellenborough said in Doe v. Laming: but its facts are materially different: in that case a clerk occupied a room in a public coffee-house, and unless there was a distinct agreement by his landlord to let him hold a particular room, he was not such a tenant as could bring trespass, and if he was a guest he could not. Had the room been actually demised for a particular term, it might have been such a "demise of some part of the premises" as to amount to a breach of the covenant: but as he was only a lodger it did not. ground taken by Lord Ellenborough for his decision is not satisfactory to my mind(a).

Bolland B.—Cognisant as the lessor was of the custom of the country, it seems to have been his intention not to suffer that sort of occupation which it authorized. Notwithstanding the close resemblance of *Doe* v. *Laming* it is safer to give its usual sense to the word

(a) And see Roe v. Sales, 1 M. & Sel. 298.

1884.
GREENSLADE
v.
TAPSCOTT.

occupation. As during the time it lasted, the agreement would have vested the party with the right to bring an action against a trespasser, this rule should be discharged.

ALDERSON B.—The words "according to the custom of the country" relate to the mode of cultivation, but that custom which is here found may have occasioned the covenant to be introduced, that the lessee should not suffer the land to be occupied without leave, nor could more apt words be used to prevent it. An occupation of land from Easter to October for planting potatoes was held to give a settlement; Rex v. Ringwood (a). Rex v. West Cramore(b), an occupation of so many luga of land to take a crop of potatoes from, was held to be a renting of land of a yearly value to give a settlement. If we substitute "yards" for "lugs," that case is exactly the present. The party has suffered the land to be occupied without the consent of his landlord in writing Doe v. Laming may well be supported on the particular facts, but Lord Ellenborough presents no distinct criterion at all, and I do not go the length he does in his judgment.

Rule discharged (c).

⁽a) 1 M. & S. 381.

⁽b) 2 M. & S. 132.

⁽c) See Comyn's Landlord and Tenant, 2 ed. 234; Church v. Brown, 15 Vesey, 265; Seérs v. Hind, 1 Vesey, 294; and Crusee v. Bugby, 3 Wik. 234, S. C. Bla. R. 766, relied on by Bayley J. in Doe v. Hogg above cited, to show that if a lessor does not provide in his lease against a change of occupancy as well as an assignment by words which admit of no other meaning, the lease is not forfeited by the lessee's grant of an underless. Doe d. Holland v. Worsley, 1 Camp. 20. per Lord Ellenborough, is contin-

SHEPHERD and Others, Assignees of Plummer, against Keatley.

1834.

A SSUMPSIT for the breach of a contract entered By the coninto between the plaintiffs as assignees and the of leasehold defendant, for the purchase by him of a leasehold premises, the estate. The declaration contained three special counts pulated that on the contract, and an indebitatus count for a leasehold estate bargained and sold, with the money counts struct of the Plea, non assump- the subsearad a count on an account stated. sit; upon which issue was joined. By consent of the quent title per rties, an order of a judge was obtained for the statement of the following case for the opinion of the court, but should not **pursuant** to 3 and 4 Will. 4. c. 42. s. 25 (a).

By indenture dated 21st March 1816, between produce the lessor's title. J. C. Crooke of the first part, J. Ellison of the second The defendant part, H. Bates and S. his wife, and J. H. Bates their som, of the third part, and J. Plummer of the fourth on investipart; after reciting that the said J. C. C., J. E., H. B., title for himand S. his wife and J. H. B. were seised of and self, it apentitled to the messuage or tenement and other heredi- defective, and tarments and premises thereinafter particularly mentioned, and agreed to be demised, in the shares and purchase: proportions following; that is to say, (here were detailed purchaser was the shares of the lessors as tenants in common, with a not concluded recital of intended improvements by J. P.) It was aliunde into witnessed that in pursuance of a licence for that pur-Pose granted from the lord of the manor of Vauxhall stipulation in the county of Surrey, and in consideration of the that the venof arrange l., so to be laid out by the said J. Plummer not be obliged

ditions of sale vendors stithey should deliver an ablease and of under which be obliged to became the purchaser, and gating the peared to be he refused to complete the Held, that the from inquiring title, by the

to produce it. Entering (a) Enacting, that the parties may after issue joined, by consent and judgment on order of any judge, state the facts in a special case for the opinion of the heard, purcourt, and agree that a judgment shall be entered for plaintiff or defendant, suant to 3 & or confession or of nolle prosequi, immediately after the decision of the case, 4 W. 4. c. 42. orotherwise as the court may think fit, and judgment shall be entered 8.25. accordingly.

SHEPHERD and Others v.
KEATLEY.

in manner before mentioned, and of the rents and covenants thereinafter contained, they the said parties on the first, second, and third part, did each and every of them, according to his part, share, or interest &c. in the premises, demise &c. unto the said J. Plummer, his executors &c., the said tenements and premises therein mentioned, for 50 years, at a yearly rent of 50l, to hold the same unto the said J. Plummer without any deduction for land tax. The indenture mentioned contained a proviso that he the said J. Plummer, his executors &c. and assigns, should be at liberty to underlet the premises, or any part thereof, or to assign the term thereby granted to any person who should become party to an indenture and thereby enter into the said covenants and agreements with the said J. C. C., J. E., H. B., and S. his wife, and J. H. B. their respective heirs and assigns, as were contained in the said indenture. The case then stated that on 2d December 1830, a commission of bankrupt issued against J. Plummer and W. Wilson as co-partners, and they were duly declared bankrupts. indenture of 3d December 1830, the commissioners duly appointed J. Johnson provisional assignee, and that afterwards the plaintiffs were chosen assignees, and on 17th December, by indenture between the provisional assignee, the commissioners, and the plaintiffs, the right and title of the bankrupt in his estate was assigned to the plaintiffs. That since the commission of bankruptcy J. C. Crooke has died, and his shares of the rent since accruing have been paid to his widow under protest. That since the commission H. Bates has died, and his shares of the rent have been since paid to his widow. On 11th May 1831, the plaintiffs put up for sale by auction (among other property) the said premises demised by the indenture of 21st March

1816, for the residue of the term of 50 years, subject to, among others, the following conditions of sale:

The purchaser to pay down immediately a deposit of 20 per cent. in part of the purchase money, and sign agreements for payment of the remainder on or before the 24th day of June 1831, but should the completion of the purchases be delayed from any cause whatever beyond that period, the purchasers to pay interest at 51. per cent. per annum from that time on the balance of the purchase money, and be entitled to the rents and profits of such of the lots as are let from the said 24th day of June. That the vendors should deliver an abstract of the lease and of the subsequent title under which the leasehold lots are held, but shall not be obliged to produce the lessor's title. The defendant became the purchaser of the premises at the sale, paid down the deposit of 20%, per cent., and signed an agreement for the payment of the remainder and the completion of the purchase according to the conditions of sale. The plaintiffs delivered an abstract of the lease and of the subsequent title under which the premises were held, and tendered to the defendant a certain indenture of assignment purporting to assign the premises to him for the residue of the said term of 50 years, but the defendant refused to accept the same. On investigating the title of the vendors on the part of the defendant, he contended that it was insufficient. It appeared that the demised premises were, at the time of executing the said lease, copyhold of inheritance, and a customary tenement of the manor of Vauxhall, in the county of Surrey, in which by custom any estate or interest in a copyhold tenement may be demised for a term exceeding one year, provided the previous licence of the lord in writing, for the granting the lease, has been duly obtained, but without such licence, by the custom of the said manor, a lease for the term of

SHEPHERD and Others v.

KEATLEY.

SHEPHERD and Others v.
KEATLEY.

more than one year is cause and ground for forfeiture of the demised estate to the lord. J. C. Crooke, one of the lessees, had only an estate for life in the demised premises under a settlement made on his marriage with Elizabeth Parry, dated 14th March 1776, with a power to lease the said premises by indenture of lease under his hand and seal, and subscribed and sealed by him in the presence of two or more credible witnesses. The lease in this case was, as to his signature, witnessed only by one witness; the power is in the words following: (set out) by which it appeared that J. C. Crooke, during his life, and his wife, if she survived him, and T. Pritchard and R. Whishaw, their heirs, executor, and administrators, after the death of J. C. Crooke and his wife, and during the minority of the children by the marriage, might by indenture under their hands and seals respectively subscribed and sealed by him, her, or them, in the presence of two or more credible witnesses, demise any parts of the said premises &c., to any persons, for any number of years, without taking any fees, at the most improved yearly rent, payable quarterly or half yearly, so that no such lease be made dispunishable of waste by any express words, and so that a condition of re-entry for non-payment of rent be contained in it, with all usual covenants, and so that the lessees seal and deliver counterparts of all such The said J. E., another of the lessors, before obtaining the licence to demise, and before executing the said lease, viz., on 17th November 1814, duly surrendered all his estate and interest in his fourth part of the demised premises, on his marrying Susannel Smith, to trustees, J. H. Bates and G Whittingham, in fee in trust for himself for life with remainders over; and the said trustees were on 10th November 1815 duly admitted, and the said J. E. had no legal estate or interest in the premises at the time of his executing

the said lease. The licence from the lord of the manor for J. C. C. and J. E. to demise, was dated 1st April 1815, and only for a term not exceeding 40 years from Lady-day then next; but the lease was granted for a term of 50 years from Michaelmas then last, (1815.) (The copy of the licence was here set out.) No licence was obtained for the said Sarah B. and her son J. H. B. in her own right, nor for J. H. B. and G. Whittingham as the trustees of the said J. E., to execute the said lease, or otherwise to demise their interests or either of their interests in the said premises for any term whatsoever. At the time defendant signed the said agreement of purchase, the said Eliz. C. widow of the lessor J. C. C., was legally entitled to an estate for life only, under the settlement of 14 March 1776, with power of leasing; and on 3d August 1831, her solicitor wrote to the defendant's solicitors a letter, stating that the validity of the lease to J. Plummer was questioned by Mrs. C. the tenant for life of an undivided moiety of the property. no proceedings have been taken in consequence.

The defendant therefore refused to complete his contract, contending that the lease was invalid, and that no perfect and secure legal title to hold the premises for the residue of the said term of fifty years, could under the circumstances be assigned to the assignees, or by them to him.

The plaintiffs contend, that the points raised by the defence have relation solely to the title of the lessor's not appearing on the abstract of the lease itself, and that they cannot be entertained under the conditions of sale, which bind them only to deliver an abstract of the lease, and of the title subsequent thereto, without regard to the title of the lessor, and that it is not open to the defendant upon this contract to go into the landlord's title.

SHEPHERD and Others v. Kratley.

SHEPHERD and Others v.
KEATLEY.

If the court should be of opinion that the plaintiffs are entitled to recover, defendant agrees that a judgment shall be entered against him by confession immediately, or otherwise as the court shall think fit. If the court should be of opinion that the plaintiffs are not entitled to recover, then the plaintiffs agree that a judgment shall be entered against them of nolle prosequi immediately after the decision of the case, and otherwise, as the said Court shall think fit.

D. Maclean for the plaintiffs. The assignees have acted bonâ fide, and done all that a court of law requires; the defendant cannot refuse to complete the purchase on account of a defect in the lessor's title, which does not appear in the abstract. The title of the plaintiffs rests on the lease of 1816; this is all they were bound to show, and they have tendered that. [Lord Lyndhurst C. B. The plaintiffs were not bound to produce the lessor's title, and they contend that they have produced an abstract to the extent which was necessary. The defendant does not want them to produce the title, but has other evidence to show that the lessor had none. The plaintiffs are within the range of the case of Spratt v. Jeffery(a), in which the defendant, having bargained to sell two leases "as he then held the same," the plaintiff agreed to accept an assignment, "without requiring the lessor's title." Bayley J. said, "The fair and reasonable construction of those words is, that the buyer shall not be at liberty to raise any objection to the lessor's title." Parke J. says, "The words 'as he now holds the same' are ambiguous, but the plaintiff contracted to pay for an assignment, without requiring the lessor's title. plaintiff contends that he is nevertheless at liberty to object to the lessor's title, although the contract does not bind the defendant to produce it; but this is an unreasonable construction, and cannot be sustained. [Lord Lyndhurst C. B. There the agreement was by the vendee, to accept an assignment of the leases, "without requiring the lessor's title;" this is different from a stipulation that the vendor shall "not be called on to produce it." If the words were used to give protection to the vendor, they cannot have a different interpretation; either expression shows that the vendor intended to convey only such estate as he had, and would be a sufficient caution to a buyer that his title was not free from suspicion. It was long doubted in equity whether the vendee of a leasehold interest could, without condition, call on vendor to prove the lessor's title. It was not settled till the case of Purvis v. Rayer(a), that on a sale of leasehold property without a stipulation to the contrary, the vendor is bound to show to the satisfaction of the purchaser, that the lessor was entitled to grant the lease. [Alderson B. The court does not say that the plaintiffs are not saved from that by the conditions, but that the other side may prove the contrary. Lord Lyndhurst C. B. Does it prevent a party from availing himself of information from any other source? Spratt v. Jeffery was decided on the inference which the Court drew from the words themselves; they held, that the words "without requiring the lessor's title," meant waiving all defects in the title.] The cases only show that now the vendee may avail himself of defects in the lessor's title, in the absence of a stipulation to the contrary; here is such a stipulation, under which the vendee could be compelled to complete the purchase according to Denew v. Deverill(b). That was an action by an auctioneer against his employer the vendor, for his commission; he had neglected to insert a clause

SHEPHERD and Others v.

SHEPHERD and Others v.
KEATLEY.

to this effect in the conditions of sale, and owing to that the contract went off. Lord Ellenborough said, "A practice has very properly sprung up among auctioneers, in selling leasehold property, to insert a clause in the particulars of sale, that the vendor shall not be called on to show the title of the lessor; had that been done the defendant would have been se-[Lord Lundhurst C. B. The declaration of Lord Ellenborough must be taken with reference to the circumstances; had there been such a stipulation there, the vendor might perhaps have been compelled to complete the purchase, but then it does not appear as here, that he was prepared with evidence to show no title in the lessor.] In White v. Foliambe(a) the sale went off, because the title produced did not correspond with that contracted for; and Deverell v. Lord Bolton(b) was decided on its particular circumstances. [Bolland B. In White v. Foljambe the lessee had no power, after the lease was executed, to insist on the production of his lessor's title.] The general rule is, that "if a purchaser of a leasehold estate had notice, at the time he entered into the contract for purchase, of the vendor's inability to produce the lessor's title, he would not be afterwards allowed to insist on its production" (c). [Alderson B. The only question is, whether, though the vendor is not compelled to produce the lessor's title, the vendee is prevented from showing that the lessor has none?] There is nothing on the face of the lease to prove that the party demising had no title; the defendant bought it with all its infirmities, and if evidence aliunde is admitted, it is in the face of Spratt v. Jeffery. [Lord Lyndhurst C. B. In Spratt v. Jeffery the words may, without much violence, be understood to mean without "requiring a title in the

⁽a) 11 Ves. 337. (b) 18 Ves. 505.

⁽c) Sugden's Vend. and Purch. 8th edit. 312.

essor," but in this case, where the words merely reeve the plaintiff from being called on to produce his itle, why may not the defendant produce another from sewhere? If that agreement amounts to a waiver of itle, it justifies the judgment, but I cannot bring myelf to think that a stipulation that the vendor should ot be obliged to produce the lessor's title, amounts to hat.] The Court will not be too astute in putting a paricular sense on particular words, where the intention If the parties can be collected without encumbering them with the technical meaning, City of London v. Dias (a). [Gurney B. The vendee only stipulates that be will not call on you to produce the title. rendor who is always called on to produce the title; a tipulation that exempts him from that, is intended to cep the title out of view altogether. Lord Lund-Exet C. B. It is stated in the case on the part of the madee, that the title contained certain defects; I do ▶ know where he got that knowledge. The defendbought the premises with the risk, no doubt they d for less with that stipulation.

SHEPHERD and Others v.
KEATLEY.

Platt for the defendant. The argument for the saintiffs is built on the words used in Spratt v. Jeffery; at there is a distinction in the two cases with reference to the subject of sale, and the terms of the sale. In Spratt v. Jeffery the subject was, "two leases, as the vendor holds the same;" here it is, "certain premises." Then the words, "without requiring the sasor's title," are stronger than "but the plaintiff hould not be obliged to produce the lessor's title." Lord Lyndhurst C. B. It is very inconvenient to the essee to produce the lessor's title; this is a sufficient eason for the stipulation, without adopting the plainffs' construction.] Suppose a lease for years, and a

⁽a) Woodfall's Landlord and Tenant, 301; edit, 1831.

SHEPHERD and Others v.
KEATLEY.

forfeiture occurs before the end of the term, and upon that a re-entry, but that the lessee still holds the parchments, it cannot be contended that if he should put up the forfeited term for sale, with a stipulation that he should not be obliged to produce the lessor's title, the purchaser should pay for nothing. If not, this case cannot be decided for the plaintiffs.

Lord Lyndhurst C. B.—The question turns on the meaning of the following words in the conditions of sale:-" The vendors shall deliver an abstract of the lease, and of the subsequent title under which the leasehold lots are held, but shall not be obliged to produce the lessor's title." It appears to me that the meaning of these words is nothing more than that as far as the vendor is concerned, he shall not be called on to produce evidence of that title for the satisfaction of the purchaser; but that they do not estop the vendee from proving that title to be bad, if he has means to do so aliunde. A stipulation in these terms is commonly introduced to avoid the inconvenience which would arise to a lessee on selling his lease, if he was obliged to prove his lessor's title. As to Spratt v. Jeffery, without saying what decision I should have arrived at in such a case, it is sufficient to say that the words there decided on "without requiring the lessor's title," are very different from these. Those words might mean the waiving all objections to the lessor's title, and the King's Bench were of that opinion. But there is nothing here to show such an intention, and it is suffcient to say that upon these expressions the vendor should not on his side be required to produce evidence of his lessor's title.

Bolland B.—It is sufficient to say that these words differ from those in *Spratt* v. *Jeffery*, and are not governed by it. As it might be inconvenient or impos-

sible to the assignees to produce it, they wisely prevented the necessity to do so. It appears that there were objections to the lessor's title, though they were not shown by the vendor. Nothing in those words prevented the lessee from procuring information aliunde that the title was bad, as, for instance, the insufficiency of the attestations to *Crooke's* execution of the power, and the defect in the licence.

SHEPHERD and Others v.
KEATLEY.

ALDERSON J.—I am of the same opinion. Spratt v. Jeffery must have been decided on the ground that the contract there amounted to a waiver of objection to the lessor's title altogether, and not merely to a production of it in evidence. I doubt if the decision could be supported on any other ground. Mr. Justice Littledale there said, the main difficulty arises from the words, "without requiring the lessor's title." the agreement together, I am disposed to think that the defendant contracted to sell a qualified title only. He rested his judgment on the ground that as nothing was said in the contract about the leases being granted under a power, the meaning of the words, "without requiring the lessor's title," probably was, that the title of the party who actually granted them should not be inquired into. That is the principle on which to rest that decision. It is unnecessary to say whether I should have concurred in the construction of those words, for they differ materially from these, but I agree in the principle as true. Applying it here, the vendors are at liberty to enforce a contract against the purchaser, without producing evidence of the lessor's title, but that cannot prevent the other side from proving that the lessor could not grant the lease.

I should also remark, that this being a case brought before us under 3 & 4 Wm. 4. c. 42. s. 25., there appears to be a plea of the general issue. Now, as by

SHEPHERD and Others

the new rules this defence could not be raised on that plea, if pleaded after *Easter* term(a), the pleadings must be amended, or the judgment must be for the defendant.

GURNEY B. concurred, saying, that if the vendor of a lease intended to protect himself against showing a good title in his lessor, he should use unambiguous language.

The Court then, on the prayer of *Platt*, directed judgment of nolle prosequi to be immediately entered.

(a) It turned out to have been pleaded before Easter term.

Toogood against Spyring.

The agent of a landlord employed the plaintiff, before and at the time of the committing plaintiff to do

work at the house of the defendant, who was a tenant on the estate. The plaintiff did it improperly, and got drunk during the time he was engaged in it. Several circumstances took place which induced the defendant to believe the plaintiff had broken open his cellar-door and got access to his cider. Two days after, the defendant saw the plaintiff in company of T, a fellow-workman, and charged him with having broken his cellar-door, got drunk, and spoiled the work. The defendant afterwards repeated the charge to T. in the plaintiff 's absence; and on the same day complained to the agent that the plaintiff had spoiled his work and had got drunk, that his cellar-door had been broken open, as he believed, by the plaintiff. Held, first, that the complaint to the agent, if bona fide made, and without maticious intention to injure the plaintiff, was a privileged communication.

Secondly, that the uttering the words to the plaintiff, though in the presence of T_n was similarly privileged, if done honestly; for that the circumstance of its being made in the presence of T_n did not of itself make it unwarranted and officious, though that circumstance with others, e. g. the style and character of the language used, might be left to the jury to determine whether the defendant acted bond for in making the charge, or was influenced by malicious motives in seeking as opportunity to make it before a third person.

Thirdly, that the statement to T. in the plaintiff's absence was unauthorized and officious, and therefore not protected, though made in the belief of its truth, if it turned out to be in point of fact false; and that it should be left to the jury whether defendant acted maliciously or not on that occasion.

of the grievances by the defendant as hereinafter mentioned, had been and was a journeyman carpenter, and accustomed to employ himself as such, and to gain his living by that employment; and had been and was at the time of committing of the grievances by the defendant, as hereinafter mentioned, retained and employed by and in the service of one J. Brinsdon, as his journeyman carpenter and workman, at and for certain wages and reward by the said J. B. to him, and in that capacity and character had always behaved and conducted himself with honesty, sobriety, and great industry and decorum, and never was, nor until the time of the committing of such grievances, suspected to have been or to be dishonest, drunken, dissolute, vicious, or lazy; to wit, in &c.: By means of which several premises the plaintiff before the committing of the said grievances had not only deservedly gained the good opinion of all his neighbours, masters and employers, but had also derived and acquired for himself divers great gains, maintenance, and support, and would have thereby continued to derive and acquire other great gains, maintenance and support, but for the commission of the grievances hereinafter mentimed, to wit, in &c. That the plaintiff, before the time of the committing of the grievances in the 1st and and last counts of this declaration mentioned, had been employed by the said J. Brinsdon as his workman and journeyman, in and upon certain work, to wit, in and about certain premises of the defendant, and then and thereupon and throughout that occasion, and during the whole of the plaintiff's work in and about the same, had behaved &c, with honesty, sobriety, and great industry, and in a proper and workman-like manner: Yet the defendant, well knowing the premises, but greatly envying &c. and contriving to cause it to

be suspected and believed that the plaintiff had been

Toogood v.
Spyring.



and was guilty of the misconduct thereinafter stated to have been charged on and imputed to him by defendant, to wit, on &c. in a certain discourse which he the defendant then and there had with the plaintiff, of and concerning him the plaintiff, and of and concerning him with reference and in relation to the aforesaid work, in the presence and hearing of divers good and worthy subjects of our lord the king, then and there in the presence and hearing of said last-mentioned subjects, falsely and maliciously spoke and published to and of and concerning the plaintiff, and of and concerning him with reference and in relation to the aforesaid work, the false, malicious, and defamatory words following; that is to say, "What a d-d pretty piece of work you (meaning the plaintiff) did at my house the other day." And in answer to the following question then and there in the presence and hearing of the said last-mentioned subjects, put by the plaintiff to the defendant, that is to say, "What, sir?" then and there in the presence and hearing of the said last-mentioned subjects, falsely and maliciously answered, spoke, and addressed to and published of and concerning the plaintiff, and of and concerning him in relation and with reference to the aforesaid work, these other false, scandalous, malicious, and defamatory words following; that is to say, "You broke open my cellar-door, and got drunk, and spoiled the job you were about;" meaning the aforesaid work.

The second count stated these words:—" He (meaning the plaintiff) broke open my (meaning the defendant's) cellar-door, and got drunk and spoiled the job, he (meaning the plaintiff) was about," (meaning the aforesaid work).

The 3d count,—"What! I?" (meaning the plaintiff). "I will swear it (meaning thereby that he the defendant would make oath that the plaintiff had

ken into his cellar), and so will my (meaning the endant's) three men."

1834. Toogood v. SPYRING.

The 4th count.—That in a certain other discourse ich the defendant had with a certain other person, wit, one R. Taylor, of and concerning plaintiff, in the esence and hearing of the said last-mentioned pern, and of divers other good &c. subjects &c., and in swer to a certain question whereby the last-menoned person, to wit, the said R. T., did then and here in presence and hearing of other last-mentioned erson, and of divers other good and worthy subjects, nterrogate and ask of the defendant whether he the lesendant meant to say that the plaintiff had broken nto the cellar of the defendant; he the defendant then and there in the presence and hearing of the lastmentioned subjects falsely and maliciously answered, poke, and published to the last-mentioned person, to wit, the said R. T., and in his presence and hearing, these other false, scandalous, malicious, and defamatory words, of and concerning the plaintiff, that is to say, "I (meaning the defendant) am sure he (meaning the plaintiff) did (meaning that he the plaintiff had broken into his defendant's cellar); and my (meaning the defendant) people will swear it."

Special damage, that by means of the premises the mid J. Brinsdon, who before and at the time of the committing of the said grievances had retained and caployed, and otherwise would have continued to retin &c. the plaintiff as journeyman, workman and serrant, for certain wages and reward, to be therefore Paid to the plaintiff, afterwards, to wit, on &c. disdarged the plaintiff from his service and employ, and tholly refused to retain and employ the plaintiff in is said service and employ; and the plaintiff hath vm thence hitherto wholly by means of the premises, QQ

Toogood v.
Spyring.

and from no other cause whatever, remained and continued and still is out of employ.

One of the counts was for speaking the words to Brinsdon.

Pleas: first, general issue. Secondly, that before the committing of the grievances, to wit, on, &c. the said plaintiff broke open a door of a cellar of said defendant, in house of said defendant, and then and there broke into said cellar, got drunk and spoiled said work in said declaration mentioned: Wherefore the said defendant did speak and publish the said words as in said declaration respectively mentioned, of and concerning and relating to said house, and said cellar, and cellar-door, as he lawfully might, for cause aforesaid.—Verification.

Thirdly, as to the first, second, and last counts of declaration, and also as to the speaking and publishing the following words, that is to say, "I am sure he (meaning plaintiff) did" (meaning said plaintiff had broken into his, defendant's cellar), as in said 4th count mentioned; the said defendant says that, heretofore and before the committing of any of the grievances in the introductory part of this plea mentioned, or any part thereof, to without on 7th January 1834, said plaintiff broke open the door of a cellar of said defendant, in the house of defendant, and then &c. broke into said cellar, got drunk and spoiled said work in declaration mentioned. Wherefore &c. Verification. Similiter and Replication of the injuria to the second and last plea.

At the trial before Bosanquet J., at the Lent assisted for Devonshire, the following facts appeared. Brindow was a master carpenter overlooking works for the earl of Devon, at Powderham Castle, and had employed the plaintiff as a journeyman. The defendant was a tenant on the estate, and had required some repairs to be done at his house; they were doing by Brinsdom's

lirections, by the plaintiff and another. On the day in juestion Brinsdon had ordered them to put up a new door on a place adjoining the cellar, under the lefendant's superintendance. It had been cut too small for the purpose. After leaving Brinsdon's shop the plaintiff got drunk, and other facts appeared sufficient to make the defendant believe that in his absence the plaintiff had broken open his cellar-door and got Brinsdon disapproved the way the door Two days after, when the plaintiff was had been cut. at work with Taylor a mason, the defendant said to the plaintiff in Taylor's hearing, "what a d-d pretty piece of work you did at my house the other day;" plaintiff asked "What sir?" The defendant replied, "You broke open my cellar-door, got drunk, and spoiled the job you were about." The plaintiff denied, but defendant said "you did it with a chisel, and my three men will swear it." He then asked where Brinsdon was, and went to seek him. Defendant was afterwards asked by Taylor, in the absence of the plaintiff, whether he really thought the plaintiff had broken the cellar-door? he answered, "I am sure he did, and my men will swear it. It is a sad thing that a man cannot be entrusted to go to work without committing these depredations." He afterwards saw Brinsdon that day, and told him Toogood had spoiled the new door; and that the cellar-door had been broken open with a chisel, and that he believed Toogood must have done it, for he had got drunk. Upon this, Brinsdon told the plaintiff that he could no longer be in his employ till the matter was cleared up. Brinsdon with the plaintiff and defendant examined the cellar-door ext day, the bolt was broken, and the joint might have parted, but it was doubtful whether it had been done at the occasion in question. Brinsdon said he thought - the charge was not made out, and that the plaintiff

Toogood v.
Spyring.



might go to work again if he liked. The plaintiff said his character was not cleared, and did not. The learned judge told the jury that if the charge against the plaintiff was true, the defendant would have been justified in going to Brinsdon at once, as the plaintiff's employer; but that as the words were spoken on the first occasion, not by way of complaint to him, and in the presence of Taylor, he thought the plaintiff entitled to maintain his action. He also said that the defendant was not justified in uttering the words to Taylor on the subsequent occasion in the plaintiff's absence. He then directed them that if they thought the plaintiff had broken open the cellar-door, their verdict should be for the defendant; if they thought it not, or if they thought the charge not entirely true, and thought the communication made to Brinsdon not justified by the circumstances, their verdict must be for the plaintiff. The plaintiff had a verdict for 40s. damages, leave being reserved to move to enter a nonsuit.

Follett in Easter term, moved for a rule to show cause why a nonsuit should not be entered, or a neutrial be had, on two grounds:—first, that under the circumstances, the defendant being interested in the work to be done by the plaintiff, the words spoke were a privileged communication; and, secondly, for misdirection.

Praced (Coleridge Serjt. with him) showed cause. First, even if the words complained of might have been uttered to the employer Brinsdon as a privileged communication, the defendant could not justify using them to the plaintiff in the presence of a third person, before he had made any intimation of it to Brinsdon. In

Macdougall v. Claridge (a), the plaintiff charged the lefendant, in a letter to third persons, with mismanaging heir concerns, he being himself interested in them; and Lord Ellenborough, in laying down that no action vould lie, expressly rested that opinion on the ground hat such a communication as was there made was not ntended to go beyond those immediately interested in The communication to Taylor when alone cannot e said to be in any sense privileged. Even if the lefendant had a right to complain to Brinsdon that the plaintiff's work was ill done, he had no right to charge him with breaking the door and getting drunk, for that amounted to a charge of felony; and though the declaration does not contain an inuendo that the defendant meant to impute felony, yet as special damage was laid and proved, such an inuendo was unnecessary; Moore v. Meagher (b). [Parke B. No special damage ras found here, the damages given were general. The plaintiff did not show himself to be removed from beneficial employment, or even to have lost his wages the time he was suspended.] There was evidence hat on the first day Brinsdon said he would not conwe to employ the plaintiff until his character was eared, and though he told him next day he might go work again, the plaintiff said his character was not cleared, and that he would not. On this proof the were justified in finding special damage to the mount of 40s., even if plaintiff were only a day out of employment. Secondly, there is no ground for a new trial, as the case was properly left to the jury; for malice against the plaintiff might be inferred from the Dunman v. Bigg (c) shows that in ircumstances. mes of communications said to be privileged as conidential, it is for the jury to decide whether the

Toogood v.
Spyring.

⁽a) 1 Camp. 267.

⁽b) 1 Taunt. 39.

⁽c) 1 Camp. 269, n.

Toogood v.
Spyring.

defendant used the expressions in question with a malicious intent of injuring the plaintiff, or bona fide to communicate facts to a party which he was interested to know (a). Now malice might here be inferred from the uttering these words to the plaintiff in Taylor's presence, and afterwards to Taylor in his absence; for on neither occasion was the statement necessary or useful in order to obtain redress for the defendant Rogers v. Clifton (b) shows, that though the law does not compel a master in general to prove the particulars given by him to a person applying for the character of his late servant to be true, yet if he officiously (c) state trivial misconduct of his servant to a former master, to prevent his giving a second character, and then himself gives him a bad character, which is disproved by the servant, malice may be inferred. The time, place, and manner of uttering the words are material to prove malice. As for instance, to charge a tailor before his other customers with selling me bad articles or spoiling a coat. Even had the defendant charged plaintiff with spoiling the work as well as breaking the door and getting drunk before a party who could redress the bad workmanship, that charge, even if made to Briss-

⁽a) In Blackburn v. Blackburn, 4 Bing. 405, Gaselee J. directed a jury to consider whether the defendant's letter was a confidential communication made bona fide in answer to inquiries instituted touching the plaintiff's conduct; and if so, whether it was or was not accompanied by express malics? for if it was, the defendant would be responsible, even though the communication was privileged. If the jury should be of opinion that the communication was not called for, they would find for the plaintiff. Verdict for plaintiff damages 501., with a finding that he was not guilty of forgery, and that defendant was not actuated by express malice. The court of C. P. permitted the verdict to stand, and approved of the learned judge's direction.

⁽b) 3 Bos. & P. 587.

⁽c) See Robinson v. May, 2 Smith's R. 3; also, Horne v. Lord F. Bestinck, 2 Br. & B. 180; Oliver v. Lord W. Bentinck, 3 Taunt. 456; Jekyll v. Morris, 2 New R. 341.

1834.

m, exceeds the bounds of privileged communication, r it is equivalent to a charge of felony. It was not quisite to leave them to the jury to say whether the mmunication was bonâ fide, and therefore privileged In Godson v. Horne (a), Richardson J. said, If a man giving advice calls another thief, surely it is ot necessary to leave it to the jury whether such nguage is a confidential communication." Here, the efendant meant to complain of more than spoiling the b, and if he was justified in alleging the defendant to ave done his work ill, as speaking of him in his trade, e still had no right to couple that charge with a collaeral assertion, amounting to a charge of felony. be words complained of were spoken at one time, and s relates to one matter, viz. on his employment in the efendant's house, and being laid as one thing, do not mount to a privileged communication. The same passequence arises if the charge of breaking open the ellar was not spoken of the plaintiff in his employent. It was the duty of the defendant to superintend be work and complain at the time (b).

Follett (Wilde Serjt. with him) contrà. The defendant is entitled to a new trial, for it should have been left to the jury to say whether the defendant was justified in using the expressions in question to Taylor as well as to Brinsdon. But the defendant is entitled to a nonmit, for this action will not lie as here framed, for charging the defendant with breaking open a cellar door without proof of special damage. Now the only

⁽e) 1 Br. & B. 7.

⁽b) He also mentioned Hollins v. Donnelly, tried at the Dorchester anises, for words spoken of an accoucheur, imputing adultery to him. The defendant insisted that the words were not spoken of him in his business as m acconcheur. Alderson J. lest it to the jury whether those were not words distinctly referring to the plaintiff's character as accoucheur, in relation to his trade or business as such.



special damage laid was pecuniary, by dismissal from Brinsdon's employ. But he was not shown to have been ever actually dismissed or even suspended. He was told one day that if the matter was not cleared, he must not continue in the employ, and the proof was, that when on the next day, Brinsdon found it doubtful whether the door had been broken open, he said the plaintiff might go to his work again; so that if he did not do so, it was his own fault. The words were not spoken of him in his trade. [Parke B. May not they have been spokenof him not as a journeyman carpenter, but as imputing to him, that while employed in that capacity he committed felony? If there be enough on the record to show that felony was imputed, it would be enough, without prof of plaintiff's having sustained injury in his trade. He might avail himself of an opportunity in his business to commit a felony.] It is submitted that the charge of breaking open a cellar door is as wholly unconnected with his employment as a journeyman carpenter, as the charge of any breach of moral duty committed by him during such employ. Neither, therefore, could it be said to be spoken of the plaintiff in his trade or employ-It is not enough if the words were spoken of him during such employ as a carpenter, unless they were spoken of him as connected with his trade, and as acting in that particular capacity; and if doubtful, their meaning should be left to a jury. This verdict proceeded on the assumption that the words used imputed a felonious act. If it was meant to insist that they did, and not that they only imputed doing work ill, it should have been so laid in the declaration; for the act of breaking open the door might or might not be felonious, and was a question for the jury. Then the defendant was entitled to a verdict on as much of the declaration as charges him with doing the work negligently and improperly. [Alderson B. Is it not

Toogood v.
Spyring.

1834.

actionable to say "you are an idle, dissolute workman; while you were employed for me you robbed me?" The first words give a complexion to the rest.] was a question for the jury, whether the words were spoken of the plaintiff in his trade, and as they were not, the defendant has a right to a new trial. [Parke B. There is one connected proposition; can it be separated as if the words were not spoken of him in the course of his trade? They are spoken of his conduct in his trade, and represent it to be the reverse of that of a sober, industrious workman.] The jury found in effect that he was a bad workman; then the breaking open the door is put as an adjunct to or instance of that, and no damages could be given. The defendant has made out his justification by proving the truth of as much of his imputation as was applicable to him in his trade, and therefore actionable.

Next, as to this being a privileged communication, can the proposition be sustained, that the defendant had no right to complain to the plaintiff in the presence of a third person? Has not an employer or party interested in work a right to complain respecting it to the servant or workman in the presence of a third person, if not shown to do so malâ fide? If he has not, no master could reprove a servant, and no buyer a tradesman, except he could find them alone. [Alderson B. You say that so doing is only more or less evidence of malice, and that it is for the jury to decide on. the communication to Taylor when alone, charged the breaking the door only, and the verdict is general.] The judge assumed that the defendant had no right to make this statement to the plaintiff in the presence of Taylor, without leaving it to the jury. But if from the circumstances proved the defendant may be taken to have really believed that what he said was true, and to have acted on that belief, he, as a party interested in Toogood v.
Spyring.

the work, was justified in thus complaining to the workman himself, Fairman v. Ives (a); though he might find him in the presence of another person. That was a question of law upon which the judge should have nonsuited; for it is only when evidence is given to show that the party acted malâ fide that it becomes a question for a jury. The communications which have been held unjustifiable, were made to third parties, and not to the party himself.

Cur. adv. vult.

The judgment of the court was afterwards delivered by

PARKE B.—In this case, which was argued on Friday before my brothers Bolland, Alderson, and Gurney and myself, a motion was made for a nonsuit or new trialupon the ground of misdirection. It was an action of slander for words alleged to have been spoken of the plaintiff as a journeyman carpenter on three different occasions. It appeared that the defendant, who was tenant of the earl of Devon, required some work to be done on the premises occupied by him under the earland that the plaintiff, who was generally employed by Brinsdon, the earl's agent, as a journeyman, was sent by him to do the work; he did it, but in a negligent manner, and during the progress got drunk, and some circumstances occurred which induced the defendant to believe that he had broken open the cellar door and so obtained access to his cider. The defendant, a day or two afterwards, met the plaintiff in the presence of a person named Taylor, and charged him with having brokers open his cellar door with a chisel, and also with having got drunk; the plaintiff denied the charges: the defendant then said he would have it cleared up, and went to

⁽a) 5 B. & Ald. 645. See ante, 590, n. (c).

look for Brinsdon. He afterwards returned and spoke to Taylor in the absence of the plaintiff, and in answer to a question of Taylor's, said he was confident plaintiff had broken open the door. On the same day the defendant saw Brinsdon, and complained to him that plaintiff had been negligent in his work, had got drunk, and, as he thought, had broken open the door; and requested him to go with him in order to examine it. Upon the trial it was objected that these were what are usually termed privileged communications, and the learned judge thought that the statement to Brinsdon might be so, but not the charge made in the presence of Taylor. And in respect of that charge and what was afterwards said to Taylor, both which statements formed the subject of the action, the plaintiff had a verdict.

We agree in his opinion, that the communication to Brissdon was protected, and that the statement made upon the second meeting to Taylor, in the plaintiff's absence, was not: but we think upon consideration, that the statement made to the plaintiff, though in the presence of Taylor, falls within the class of communications ordinarily called privileged, that is, cases where the occasion of the publication affords a defence in the absence of express malice.

In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another, (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reason-

Toogood v.
Spyring.



able occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits.

Among the many cases which have been reported on this subject, one precisely in point has not, I believe, occurred; but one of the most ordinary and common instances in which the principle has been applied in practice, is that of a former master giving a character of a discharged servant; and I am not aware that it was ever deemed essential to the protection of such a communication, that it should be made to some person interested in the inquiry alone, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry, (and that has been very liberally construed, Child v. Affeck and others, 9 B. & C. 403; Pattison v. Jones, 8 B. & Cr. 578,) the nature of the transaction cannot be altered by the simple fact that there has been some casual bystander.

The business of life would not be well carried on if such restraints were imposed upon this and similar communications, and if on every occasion in which they were made, they were not protected unless strictly private. In this class of communications is, no doubt, comprehended the right of a master bonâ fide to charge his servant for any supposed misconduct in his service, and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another, does by no means of necessity take away from it the protection which the law would otherwise afford.

Where, indeed, an opportunity is sought for, of making such a charge before third persons which might have been made in private, it would afford a strong evidence of a malicious intention, and thus deprive it of that immunity which the law allows to such a statement when

ade with honesty of purpose; but the mere fact of a ird person being present does not render the comunication absolutely unauthorized, though it may be circumstance to be left with others, including the style id character of the language used, to the consideration the jury, who are to determine whether the defendit has acted bona fide in making the charge, or been fluenced by malicious motives.

Toogood v.
Spyring.

In the present case, the defendant stood in such a lation with respect to the plaintiff, though not strictly at of master, as to authorize him to impute blame to m, provided it was done fairly and honestly, for any pposed misconduct in the course of his employment. and we think that the fact that the imputation was ade in Taylor's presence does not of itself render the mmunication unwarranted and officious, but, at the set, is a circumstance to be left to the consideration of e jury.

We agree with the learned judge that the statement Taylor in the plaintiff's absence was unauthorized d officious and therefore not protected, although made the belief of its truth, if it were in point of fact false; it, inasmuch as no damages have been separately given on this part of the charge alone, to which the fourth unt is adapted, we cannot support a general verdict, the learned judge was wrong in his opinion as to the atement to the plaintiff in Taylor's presence; and as think that at all events it should have been left to the ry whether the defendant acted maliciously or no on at occasion, there must be a new trial.

1834.

Spicer against Burgess.

A party in a cause executed a deed-poll of release to an intended witness, who was otherwise incompetent, and handed it to his attorney to be used if it should be necessary to call the witness at the trial; it being afterwards thought advisable to release another witness, his name was inserted in the release, and the party reexecuted before it had out of his attorney's possession. Held, that it was still in fieri, and might be read in evidence without a fresh stamp.

But quære, whether one stamp is sufficient on a release to two witnesses?

TRESPASS. Before the trial at the last Surrey assizes, it was known that Churchill, one of the defendant's witnesses, was incompetent till released. A deed releasing him was, without his knowledge, executed by the defendant, whose attorney retained it in his possession without delivering it to him. discovered, in the course of the cause, that it would be advisable also to release another witness for the defendant, named Pizzey, his name was inserted in the deed, the rest of which having been duly altered throughout so as to include him, was re-executed by the defendant. This alteration in the release having appeared on its production, the plaintiff objected that it had become a perfect deed by the first execution, so that a fresh deed stamp would be requisite on the reexecution after inserting Pizzey's name; or at least that its re-execution in an altered state avoided the first been delivered release to Churchill. The learned judge, Lord Lyndhurst C. B. having overruled the objection, the witnesses were examined and the defendant had a verdict-In Easter term Platt obtained a rule for a new trial.

> Adolphus and Thesiger shewed cause. Were these witnesses duly released? The deed was so far under the controll of the obligor, after its original execution. that it might be intercepted and further operation giver to it without a fresh stamp, for it was still in fieri: no had the first stamp, to use the expression of Loral Ellenborough in Webber v. Maddocks (a), ever beer " occupied." In the case cited, parties who had agreed to give the plaintiff a bill sent him a promissory note;

he immediately returned it to be altered into a bill according to the agreement (a); and it was held that the instrument so altered into a bill did not require a fresh stamp, as it had never been negociated in the shape of a note; Lord Ellenborough saying, "It remained in the hands and under the dominion of the original parties; every thing continued in fieri till after the alteration. The stamp was not occupied till then." Matson v. Booth (b), was an action on a bond of indemnity to the sheriff, which had been prepared in the name of four obligors and executed by them, but being objected to by the sheriff for want of a fifth obligor, his name had been inserted and his execution obtained without a fresh stamp; and the bond was held good on the same principle. Bayley J. there said, "With respect to the objection upon the stamp, I am not aware of any case like the present in which it has been holden that a new stamp is necessary. If a bill be altered while still in the drawer's hands before it gets into circulation and is accepted, it has never been considered that a new stamp was requisite, otherwise if it has been accepted, for then it has become a complete bill. Now here the bond was never out of the hands of the obligor, it remained with his agent and never passed to the obligee.

⁽a) Kershaw v. Cox, 3 Esp. N. P. C. 246, per Le Blanc, J. (as explained, 10 East, 434; 15 East, 417,) shows, that a correction of a mistake in a bill returned for that purpose by the indorsee, promptly made in furtherance of what was substantiated by proof to be the original intention of the parties at the time of making it, will not make a fresh stamp necessary; if, as in that case, (which as well as Jacobs v. Hart, 6 M. & S. 266; 2 Stark. C. N. P. 45, S. C. Kennerley v. Nash, 1 Stark. 452; Stevens v. Lloyd, M. & Malk. 292; appear to be cases of bills for value) the alteration takes place after the original drawer or payce might have sued on them, but before effectual negociation to an indorsee. From Downes v. Richardson, 5 B. & Ald. 674, it would appear that an alteration in an accommodation bill would be fatal, if made after issue to any person who could make a valid claim upon it viz. to the first holder for valuable consideration.

⁽b) 5 M. & Sel. 223.

SPICER v.
BURGESS.



As my Lord has remarked, it was in fieri, the bond was in nature of an escrow only." That case is distinctly in point. Nor is the present like the instance of a deed delivered, not as such absolutely, but as an escrow to a stranger, to be kept by him, and not to take effect as a deed till some condition is performed by the grantee. For in that case, when the condition is performed, the grantee's title to the possession of the deed having become absolute, he may demand possession of it, which in this case the witness first released could not do, the execution of the deed being merely de bene esse. [Lord Lyndhurst C. B. You may assume the fact in this case to be, that the deed was not intended to operate as a deed unless the witness was called, and not to operate if he was not called.] The delivery of the release by the obligor was not complete. [Lord Lundhurst C. B. Had it been once delivered as an escrow, could any difference arise, as it must be stamped in that case?] In 1 Sheppard's Touchstone, 58, Preston's edit. distinction is drawn between the delivery of a deed to a stranger and to the party; and it is said that if a deed be delivered to a stranger without any declaration, intention or intimation, unless it be in a case where it is delivered as an escrow, it seems not a sufficient delivery; and yet if an obligation be made to the use of a third person, expressed in the deed, and the obligor deliver it to him to whose use it is made, this is said to be a good delivery. This shows that while a deed remains in the possession of the party making it, it is not considered as complete, and is consistent with the passage in Comyns's Dig. tit. Fait, (A. 3,) that "if it be delivered as his deed to a stranger to be delivered. to the party on performance of a condition, it shall be his deed presently, and if the party obtains it he may sue before the condition performed." That position is

1834.
SPICER

BURGESS.

altogether denied by the court in Johnson v. Baker (a). Nor is the second "caution" prescribed in the Touchstone on delivering a deed as an escrow complied with, for instead of its being "to a stranger and to one who was no party to it," it was to the defendant's attorney, whose possession was indentical with his own. Murray v. Earl of Stair (b), the bond had been delivered by the obligor as his deed, but before and at the time of the execution it was agreed that it should remain in the hands of another person till a certain event took place, and it was delivered to him accordingly. It was held to be a question of fact for the jury, on the whole evidence, whether the bond was delivered as a deed to take effect from the moment of delivery, or as an escrow, not to operate as a deed till the event hap-That could not have been so held, had the execution of the bond been sufficient without more. In the learned judgment of the court in Doe d. Garnons v. Knight (c), Taw v. Bury (d) and other cases are cited as clear authorities that on a delivery to a stranger for the use and on behalf of a grantee, the deed will operate instanter, and its operation will not be postponed till it is delivered over to or accepted by the grantee; and the court held, without question, that delivery to a third person for the use of the party in whose favour a deed is made, where the grantor parts with all controul over the deed (e), makes the deed effectual from the instant of such delivery. That shews that till the grantor parts with his controul over a deed, the absolute execution of it without delivery does not make it complete, and it is still in fieri subject, to

⁽a) 4 B. & Ald. 442.

⁽b) 2 B. & Cr. 82.

⁽c) 5 B. & Cr. 671, 692.

⁽d) Dyer, 167 b; 1 Anders. 4.

⁽e) See the Lord Chancellor's expressions in Cotton v. King, 2 P. Wms. 358, cited in argument 5 B. & C. 684, Doe v. Knight.

Spicer v.

alteration. In Johnson v. Baker (a), a surety was sued on a covenant in a deed for payment by him of certain sums in full discharge of the debts of a trader; and though he had executed it in the usual way, it was held only to operate as an escrow, it having been previously stated that the deed should not operate unless all the creditors signed. In Jones v. Jones (b), a marriage settlement was held good without a fresh stamp, which, after execution by the only conveying party, had been altered before execution by the rest on objection by one of them, was afterwards re-executed by the conveying party (c). [Bolland B. In Rex v. Bayley (d), Mr. Justice Littledale held, that a release by the holder of a bill to one of two joint acceptors for valuable consideration to both of them jointly, was sufficient to make them competent witnesses to prove the forgery, though on one stamp. Alderson B. In this case the release of the one witness is not a release of the other.]

Platt in support of the rule. The question is, whether a deed of release to Churchill having been delivered by the defendant with due formality, and attested by a witness, became his act and deed, perfect for all purposes, and without reference to the use which might afterwards be made of it. Under these facts the stamp had been occupied. Had it been a release of lands the estate would have passed, or suppose it to have been produced after thirty years had expired, it would prove itself as a perfect deed, and the attestation would be

⁽a) 4 B. & Ald. 440.

⁽b) Ante, Vol. III. 890; see 4 B. & Ald. 675, per Bayley J:

⁽c) In Hall v. Chandless, 4 Bing. 123, there were five parties to a lease. Three having executed, it was, by consent of one of them only, altered in a manner affecting him and not the rest. The other two then executed, and the deed was held valid. Pigott's case, 11 Rep. 27; Doe d. Lewis v. Bingham, 4 B. & Ald. 672, were cited. And see Hudson v. Revett, 5 Bing. 368.

⁽d) 1 C. & P. 435.

1834.

evidence of its due execution. [Lord Lyndhurst C. B. Would its appearing to be a perfect deed preclude the opposite party from shewing that it had never been delivered out of the hands of the party releasing? is clear that it was never intended to operate unless the persons named in it should be called as witnesses, nor could they have otherwise insisted on the benefit of it.] The deed being duly executed became operative to release Churchill; nor can its operation at that time be altered by any condition on which it was to be delivered. If it did not originally operate as a deed, when did it? In Johnson v. Baker the delivery was held to be of an escrow only, for being inter partes, and not executed by all the parties, it might well be held incomplete (a). Had it been necessary to read it as evidence, could he have done so without a stamp? [Lord Lyndhurst C. B. This is a mere deed poll, which the party released was ignorant of, and which remained in the possession of the attorney of the releasor. That introduces some analogy to the cases of bills. Alderson B. In Matson v. Booth (b) Bayley J. says the bond was in the nature of an escrow only. May it not be altered in the intermediate time?] If it were an escrow only, it could not have been read without a stamp if any question arose on it while in that state; after being stamped it could not be altered. The cases on bills and notes turn on this, that they being negociable instruments are not considered perfect till circulated. [Gurney B. You are not driven to contend that the deed is void as to Churchill, if you can establish it to be so as to Pizzey by the previous occupation of the In Matson v. Booth the bond was never perfected according to the original design, which was not to be carried into effect till all the sureties were inserted to the satisfaction of the sheriff; whereas here the

⁽a) See last page, note (c). (b) 5 M. & S. 223.

SPICER v.
BURGESS.

original object of releasing Churchill only was perfected by the execution of the deed-poll. [Lord Lyndhurst. In every case of this kind the question is, whether, under all the circumstances, the matter was in fieri or not up to the time of the alteration? That must be collected by the court from the nature of the transaction. In Matson v. Booth the addition of the fifth obligee, before the bond was used, was held not to vitiate the bond, which was considered to remain imperfect till it was absolutely executed and delivered to the obligee. In the present case the release, after being executed by the party, remained in her attorney's hands as her own, its object only being that, if necessary, it should be produced at the trial. Before it was so produced, it was found requisite to insert in it the name of another witness. And the question is, whether it did not remain in fieri till it was used, and whether these circumstances are not at least as strong as those in Matson v. Booth? The inconvenience of permitting successive alterations of a deed while in the possession of the obligor or his attorney might be great. Jones v. Jones was inter partes, this is a deed-poll.

Cur. adv. vult.

Lord Lyndhurst C. B. delivered the judgment of the Court.—This was an application for a new trial, on the ground that improper evidence had been received. The question turns on this point; it had been deemed necessary that a witness should be released, and accordingly a deed was prepared and executed in the usual form, and was handed over to the attorney of the party releasing, to be given to the witness, if it should become necessary, at the trial. Previously to its being used, it occurred to the counsel that another witness might be necessary, and accordingly the deed was altered, by the insertion of the second witness's name,

and by the adaptation of the words of the deed to that insertion. Being thus altered, it was re-executed before it was delivered to the witness. It might have been a question how far the stamp would have been sufficient for a release to both the witnesses, but the objection taken at the trial was, that the stamp having become functus officio by the first execution, could not again be used. No doubt if the deed had in the first instance been so completely executed that the stamp was once occupied, no further use could have been made of it, and a re-execution would have required a fresh stamp. But so long as it remained in fieri it was not completely executed, and the stamp was not occu-In Matson v. Booth(a) the bond had been executed by the plaintiff and the four sureties in the usual manner and tendered to the sheriff, but the Court observed that was in fieri and in the nature of an escrow only. In that case, as well as in the present, the bond was delivered in the usual form of words. In Murray v. Earl of Stair (b) it was held, that in order to make the delivery conditional, the conclusion was to be drawn from all the circumstances of the case. The distinction between the execution of a deed being in fieri or being complete, was likewise taken in Jones v. Jones (c). These cases are decisive with regard to the objection which was taken at the trial. The deed, though completely executed in point of form, was placed in the hands of the attorney only to be used in case it became necessary. We think that, under these circumstances, the execution of the deed in question was in fieri only, and that the re-execution did not make a new stamp necessary.

Whether one stamp would have been sufficient for a release to two persons may well be doubted, but that

SPICER v.
BURGESS.

⁽a) 5 M. & S. 223.

⁽b) 2 B. & Cr. 88.

⁽c) Ante, Vol. III. 890.

1834. SPICER 97. Burgess. objection was not taken at the trial (a). If it had been then taken it might probably have been removed by procuring a fresh stamp. We are all of opinion that the rule must be discharged.

Rule discharged (b).

(a) See Rex v. Bayley, 1 C. & P. 435.

(b) See a converse case, Waddington v. Francis, 5 Esp. R. 182. Two stamps were held necessary where a written stamped agreement for a wager was indorsed with another agreement for doubling the bet, Robson v. Hall, 1 Peake's R. 128; but it was held evidence of the first agreement, that not being varied by the second, per Holroyd J. Reed v. Deere, 7 B. & Cr. 264. Where several were admitted to the freedom of a corporation on one stamp, the admission of the first person only was held good; see per Ashurst J. Gilby v. Lockyer, Doug. 216; Rex v. Reeks, Lord Raym. 1446.

Snelling against Lord Huntingfield.

A. went to B. on 20 July, to treat with him ment as farmhanded to him a paper on which the proposed terms of service were written, but it was not signed by either ed when he was to come. B. said on the 24th. A. made no objection, but took the paper away came into the

▲ SSUMPSIT. The declaration stated that on 24 July 1832, in consideration that the plaintiff, tofor an engage- gether with S. L., at defendant's request, would become ing bailiff. B. servants of defendant, the plaintiff, as bailiff, and S. L. as housekeeper, to continue for a year at 80l. wages to be paid to the plaintiff, the defendant promised to employ him as such servant, and to continue him in his service for the year ensuing. Averment, "that the plaintiff entered into the service and found and proparty. A ask- vided S. L. to act for defendant as housekeeper, and paid her accordingly, yet the defendant would not continue the said plaintiff in his service till the expiration of the year." The 2d count stated, that, in consideration that the plaintiff would become servant to the defendwith him, and ant, and would find, provide for, and pay a person who

service on the 24th. Held: that this was an agreement on the 20th for a service for a year from the 24th, and as the memorandum was not signed by the party to be charged, it was not valid by section 4 of the statute of frauds, 29 Car. 2. c. 3.

would act for the defendant as housekeeper, and would continue in the service of defendant for a year, at certain wages &c., the defendant promised (as before). There was a count for wages, work and labour, and materials found, goods bargained, sold and delivered, money paid, lent, had and received, and on an account stated. Pleas: first, non assumpsit, except as to 211. 3s. 5d., part of the sum claimed in the third count, and as to that a tender; secondly, a set-off for goods sold &c., upon which issue was joined. At the trial before Gurney B. at Guildhall, on 10 June 1833, the following facts were proved: -On 20 July 1832 the plaintiff went to the defendant for the purpose of making an agreement to go into his service as bailiff, and the following memorandum of the proposed terms of hiring was written by the defendant in the plaintiff's presence :--

"The pork wanted, to be at 5s. per stone.

The wheat required, at 27s. per coomb.

The board of two servants, at 2s. per day.

The person and his daughter a housekeeper, to do for them and manage the dairy and some poultry. person to have the road running through the parks as the division of the lands to be managed by each bailiff. You take the south side. The salary for the bailiff and housekeeper to be 80l. per year. All expenses paid going either to market or sales." This paper was not signed by either party, but was handed to the plaintiff, who then asked when he was to come: the defendant said on the 24th: the plaintiff made no objection to this, but took the paper away with him, and came on that day. He remained in the service three months and twelve days, when the defendant gave him notice to leave at the expiration of a month from that On the 14 November the defendant ceased to give the plaintiff any orders, and wished him to leave the premises at once; but he refused and remained till

SNELLING
v.
Lord Huntingfield.

SNELLING
v.
Lord Huntingfield.

6 December, when the month's notice expired. defendant paid into court 211.3s. 5d. wages for three months and twelve days from the 24 July; he had before tendered it, but the plaintiff rejected it, saying that he insisted on a year's wages; and in his bill of particulars he claimed "salary from 24 July 1832 to 24 July 1833, When the plaintiff came into the service three servants were kept by him instead of two, as mentioned in the proposal. It was objected on the part of the defendant, that the contract proved was an agreement on 20 July for a year's service, to begin from the 24th; and therefore, that as it was a service which was not to be performed within the space of one year from the making of the agreement, the memorandum should have been signed by the party to be charged by the statute of frauds (a). The plaintiff contended that the agreement was not made till 24th, when by entering into the service he shewed his assent to the previous proposal, and therefore it was to be performed within the year. The learned judge said that he would reserve the point on the statute of frauds, if it should be necessary, and then left it to the jury to find, first, whether the special counts had been proved, and next, whether any thing was due for board of the servants after the 14 November, which could be recovered under the count for goods sold, or money paid. The jury found a verdict for the plaintiff, with 601. damages on the special counts, and 31. a balance due on the common count for board supplied by the plaintiff to the servants after the 14 November, with the assent of the defendant.

In Trinity term 1833, the Recorder (C. Law) obtained a rule to enter a nonsuit, on the ground, first, that the agreement proved was not valid by the statute of frauds, Bracegirdle v. Heald (b); secondly, that the contract proved varied from that set out in the declaration; and thirdly, that the evidence did not support the third

count. No question arose on the tender or the payment of money into court. 1834.

SNELLING

v.

Lord HUNTINGPIELD.

Bompas Serjt. and Platt showed cause. The only question is, whether there was evidence to infer a contract entered into on the 24 July for service for twelve months, to begin from that day, as stated in the declaration. Bracegirdle v. Heald does not apply, because that was an action for not receiving the party into the defendant's service, and therefore rested on a supposition that the contract existed before the service began. So in Boydell v. Drummond (a), the agreement was for the delivery of a future publication, which by the terms of the contract could not be complete within the year. But in this case no contract existed till the plaintiff had assented to it by entering the service. The written document which was delivered on the 20th, was merely a proposal of the terms on which the defendant would take the plaintiff into his service; it was not obligatory till the plaintiff had assented to it, and he did not give his assent to it till he went into the service on An agreement, to be within the statute of frauds should be available at the time; but in order to be binding, it must be mutual, and when the paper was handed to the plaintiff he was not obliged to enter into the service, as he had done nothing to adopt the terms at that time. [Lord Lyndhurst C. B. What contract was made between the parties except that? The defendant, when they met on the 20 July, wrote down the heads of the terms, which the plaintiff had an opportunity of seeing: he then said, "you will come on the 24th; the plaintiff went away apparently assenting, took the paper with him, and did come again on the 24th. Is not this an assent? It is very strong evidence for a jury that at that time he agreed to come on the 24th, and serve on the terms contained

(a) 11 East, 142: 2 Camp. 157. S. C.

SNELLING

O.

Lord HUNTINGFIELD.

in the papers. Then his coming on the 24th explains his previous want of assent. Alderson B. If the plaintiff went into the service without a contract, how can he support the statement in the special counts? He did not promise on the 20th to return on the 24th, and the terms on which the service was executed were different from those that were first proposed, for instead of two, three servants were kept by the plaintiff. [Lord Lyndhurst C. B. The employment of another servant does not vary the terms of the agreement, and in all other respects the service comsponds with it, though the additional servant entitled him to extra payment on that account.] But suppose the contract absolutely void, then the fact of one party going into the service and the other receiving him, is evidence of a contract then made, which the law would presume to be for a year. Co. Litt. 42 b. Beeston v. Collyer (a), Rex v. Worfield (b). [Alderson B. the law presume a contract corresponding with that set out in the declaration? In cases on the poor laws & contract for a year may be inferred from the fact of the party going into the service; but such a contract as is stated in the declaration cannot be implied from the same circumstances.] The jury found that the plaintiff had been paid his wages pro rata during the times he remained in the service; and from such payment = new contract will be presumed to have commenced on the 24th, which was regulated by the terms contained in the proposal: as where a party holds premises under 🛎 lease not valid by the statute of frauds, the court will admit evidence of the terms of that agreement to regulate the tenancy; Doe d. Rigge v. Bell (c). So a void boad has been referred to in order to ascertain the terms of hiring when an action of assumpsit has been brought

⁽a) 4 Bing. 309; see per Gaselee J. id. 313.

⁽b) 5 T. R. 506; and see as to hiring a bailiff, The Earl of Manfield to Scott, 1 Clark & F. Rop. Dom. Proc. 319. (c) 6 T. R. 176.

for services performed; White v. Cuyler (a). [Lord Lyndhurst C. B. If there is evidence of a contract and a service agreeably to the terms of it, why should we imply another? The party cannot reject that, because it is not valid in point of law.] What took place before-hand was part of the evidence of a contract, and not the contract itself. All domestic servants are hired in the same way a few days before they come into the service, but the contract does not take effect till the day on which the service begins. As for the verdict on the third count, there is evidence of board furnished, which will support a count for goods sold; for it is impossible for a person to board servants for the defendant without laying out money and supplying goods for his use. In Brown v. Hodgson (b) Mansfield C. J. says, "If a man pays money for another not officiously and without reason, he may support the action for money paid."

SNELLING
TO.
Lord HUNT-INGFIELD.

C. Law and Chilton in support of the rule were stopped by the court.

Lord Lyndhurst C. B.—If a party does not prove a contract, the court may infer one corresponding with the acts of service; but we need not here presume another contract, when the plaintiff has relied upon one which differs only in one particular from the service which was performed. Here is a contract in fact (c), to which all the acts of the parties are referable. The question is not whether the plaintiff is entitled to compensation for services performed, but whether he is entitled to damages for a breach of contract by the defendant in not employing him in his service to the end of the year. (d) My opinion is, that the contract was entered into on the 20th, four days before the 24th.

⁽a) 5 T. R. 471.

⁽b) 4 Taunt. 190.

⁽e) See Williams v. Jones, 5 B. & C. 108.

⁽d) See Maser v. Payne, 3 Bing, 285.

1834. SNELLING Lord HUNT-INGFIELD.

As there was no memorandum in writing signed by the parties, there is no evidence, as required by the statute of frauds, to support the special counts. Upon these, therefore, the defendant should have a rule for a nonsuit. Upon the common count the plaintiff is entitled to 3%

At the suggestion of the Court the defendant consented to pay that sum to the plaintiff, and undertook not to call on him for costs unless he bring a fresh action. Rule absolute(a). Subject to those terms.

(a) Hulle v. Heightman, 2 East, 145; Eardley v. Price, 2 N. R. 333. mt cited in Collins v. Price, 5 Bing. 132. Gandall v. Pontigny, 1 Stark. C. N. P. 198; 4 Camp. 375, S. C. seems contrary to the principal case.

REEVE against BIRD.

A. let premises, consist-ing of a stable and cottages, to B. for seven years. В., before the expiration of the the premises to C. and paid his rent up to that day, which was in half year. C. occupied part of the premises, and on leaving them, not at the end

A SSUMPSIT on a special agreement of demise, by which the tenant was bound to keep and leave the premises in repair, and to leave all improve-Breach, that the defendant did not, during ments. the tenancy, keep the premises in good repair, nor so term, assigned leave the same with all the improvements. were the common counts for use and occupation, morey paid, and on an account stated. Plea: Non-assumpsit At the trial before Denman C. J. at the last assist the middle of a for the county of Cambridge, it appeared that the plaintiff being possessed of certain premises, consisting of stables and three or four cottages in the town of Cambridge, and being resident at a great distance,

of a half year,
paid rent for the time to A.'s agent. A. was not at that time aware either of the
assignment or the occupation by C. Afterwards, but still before the expiration of the term, A.'s agent advertised the premises to be sold, and no sale taking place, let two of the cottages to fresh tenants, in order, as he said, to relieve some tenants who had me away. The agent afterwards received portions of the entire rent from the tenants, and the rest from C. the assignee of B. Held, that these facts, taken collectively, anomaly

to a surrender of the term by operation of law.

Semble, When a number of facts, which singly may be ambiguous, amount callectively to an unequivocal proof of a fact, e. g. the surrender of a term, a judge is not bound to submit them formally to a jury, unless the counsel expressly desired in

reed with the defendant, by an instrument dated June 1826, not under seal, but signed by both pars, to let them to him for a term of seven years, ginning on the 25 June 1826, at the annual rent of L. payable half yearly at Midsummer and Christson the terms mentioned in the declaration. m would have expired at Midsummer 1833. 26 to 1832 the defendant continued to hold the preses, occupying the stables as an innkeeper, and tting the cottages to different under-tenants. muary 1832 the defendant having become embarrasid, agreed to assign all his effects for the benefit of is creditors, and though no actual assignment was xecuted, Mr. Bullock took upon himself the character By an agreement of 5 January 1832, the fendant assigned to Bullock all his interest in the emises, and all the arrears of rent from Bird up to at day were paid to Harris. Bullock took possesn of the stables on 2 April, paid rent to Harris, the agent of the plaintiff, and after an occupation of months let them to Ekin, who left them at the end June 1832, and sent the key to Bullock. not know on 2 April, nor till a month afterwards, ** Bullock was in possession of the premises. wary 1833 Harris received of Bullock 361. 10s. as balance of half a year's rent due on the entire preses, having before received portions of the rent from other tenants, for which he gave receipts in the lowing forms :-

Received, December 1832, of Mrs. Pledger, three pounds ten shilts, for half a year's rent due Midsummer, for Mr. Reeve's house King Street.

£3: 10s.

Chas. P. Harris.

Received, 15 January 1833, of Mrs. Pledger, the sum of three unds ten shillings, being half a year's rent of premises in King reet, held of Mr. Reeve, due Christmas last.

£3: 10s.

Chas. P. Harris.

REEVE v. Bird. REEVE v. BIBD.

Received, 23 January 1833, of Mr. Prince, the sum of nineteen pounds sixteen shillings and eight pence, being one year's rent of premises in King Street, held of Mr. John Reeve, due Christmes last, (less three shillings and four pence, gaol rate.)

Chas. P. Harris.

On 11 August 1832 Harris, by direction of the plaintiff, advertised the premises for sale; they were not sold, but he afterwards let one of the cottages to Mrs. Allen, and in February 1833 again let one to Susan Dealty. Harris said that he did not see the defendant all this time, but that some of the tenants had run away, and he let the premises to save the par-There was no evidence that the premises were out of repair when the defendant left them. learned judge thought that it was difficult to say that no surrender had been made, and said that there was nothing for the jury except the state of repair at the end of the term. The jury on this found a verdict for 51. as a fair sum to put the premises in repair at the end of the seven years, and the plaintiff was then nonsuited, with leave reserved to move to enter a verdict for 761. 8s. the balance of rent due to Michaelmas 1833, and 51. the amount of repairs.

A rule for a new trial was obtained in Easter term, on the ground that the learned judge had refused to submit to the jury the facts from which a surrender of the term was inferred, and that a jury should decide whether there was not an eviction of part of the premises only, and then the defendant would be liable on the quantum meruit, if his interest in the remainder continued; Stokes v. Cooper (a).

[Parke B. It does not seem noticed in that nisi prius case that it is the landlord's own act if he evicts

the tenant from part of that for which he has an entire rent: but the true point here is, whether there was not abundant evidence to show that the plaintiff, with the defendant's assent, let to other persons].

1834. REEVE v. BIRD.

Biggs Andrews now showed cause. The term was purrendered by operation of law, by the assignment of the premises to the trustee whom Reeve afterwards recognized; therefore no rent is due from the defendant since that time, and the evidence shows that all rent due before had been paid. The original landlord gave up his claim on the defendant, because when he quitted possession in the middle of the half year he paid 271. due at that time: since which he has received the rent from his assignee, Bullock; Thomas v. Cook (a). Again, the sale by Harris, advertised in August 1832, though the term would not have expired till the next year, is evidence of an eviction. This is not an equivocal act, as endeavouring to let the premises by putting up a bill in the window, as in Redpath v. Roberts (b), which might have been for the tenant's benefit; but here some of the premises were actually let to Mrs. Allen, and afterwards another cottage to S. Dealty. This eviction of part amounts to an eviction of the **bole**, Dalston v. Reeve (c), Smith v. Raleigh (d).

Kelly and Palmer in support of the rule. At the trial the chief justice said there was nothing for the jury except the state of repairs at the end of the term. There is no fact upon which the presumption of a surrender can arise, except the letting of the cottage to Mrs. Allen. If there was a surrender, when did it take place? not on 5 January, because there can be no

⁽a) 2 B. & A. 119; 2 Stark. 408, S. C.; Phipps v. Sculthorpe, 1 B. & Ald. 50, S. P.

⁽b) 3 Esp. 225. (c) 1 Ld. Raymond, 77. (d) 3 Camp. 513.

REEVE v.

valid surrender except by consent of the parties, and · Reeve was not then aware of the change of the tenants; neither did the receipt of rent by Harris from Bullock. in the following April, amount to a surrender of the term. because he treated him as the trustee of Bird, paying rent on his behalf; and did not intend to accept thin as a new tenant (a) but even if Harris had accepted a new temant, it would not have affekted the philitiff, because it would have been beyond the scope of Hariff authority as agent, which was to collect the rents only, and not to accept surrenders or make alterations in the tenancy. The demise of the cottage to Dealty was not an eviction, because Harris said that he put the persons in, not in order to resume possession for the landlord, but to save some of the tenants who had run away; and a underletting under such circumstances is not equivalent to an eviction by the landlord! Parke B. Is it not abundant evidence of the plaintiff having, with the consent of the defendant, let to another tenant? if so, the is within the thise of Tromas v. Cook [11] But at in rate the eviction of one cottage does not 'amount to's surrender of the whole. There may be an apportionment of the rent in respect of that but of the limit leased which is evicted, "Clim's case (b) "Purke B." is said in Co. Litt. 148 b. that if a lessor effer with the lessee for life or years into part, and thereof dissessed put but the lessee, the rent is suspended in the white and shall not be apportioned; and in Walker's case(6) it is said that if a man leases three acres, renderal rent; and the lessor ousts the lessee of ohe sale. But is there any thing in subsequent man.

⁽a) See Matthews v. Savell. 8. Tenut. 270 2. 15 100 (b) 19 Carly hiller (c) 3 Co. Rep. 22 b. But it is added, "if the lessor recovers part in a control of the l

I have an action of debt for no part." If the landevict, he must take the consequence of his own.

Then the facts ought to have been left to the, but the judge said there was nothing for them.

The B. Should not the judge be distinctly asked about the facts to a jury, if they appear ambiguous? it is quite clear in this case what would have been finding of the jury. Alderson B. The landlord gets rid of an insolvent tenant, and the jury would light evidence readily presume that he wished to his, and had accepted a new tenant.

REEVE .v. BIRD.

ARKE B. had left the court to attend chambers.

DLLAND B. was absent this day from indisposition.

LDERSON B.—The rule must be discharged. Whethe facts proved were or were not evidence of a ender, was properly a question for the jury. been distinctly put to the judge that the question for the jury, and he had been requested to state it rem in such and such specific terms, but he had ight it a mere question of law, and that there was ing for the jury, I should have been of opinion there should have been a new trial: but his exsion that there was nothing for the jury, must be n to mean that there was nothing of doubt for them The evidence desired to be left to the should have been distinctly put to the judge, in r that it might have been disposed of by them at But is there any thing in substance upon h the jury could reasonably entertain a doubt, had en submitted to them? Though, taking the cirstances separately, no one might have proved the if they are taken all together there is sufficient resume a surrender of the term by operation of law.

REEVE BIRD.

First, there is a payment of rent to the 5 January 1832, and then to the middle of the next half year, by Bullock, of rent which would not have been due till the Mideummer following; secondly, the advertising the premises for sale, and alternately letting some parts of them to new tenants; and lastly, the receipt of rent from the rest of the old under-tenants by the plaintin's agent. The question being, whether before the pretrises were out of repair the landlord had accepted another tenant, so as to effect a surrender "by act and operation of law," I am of opinion that the landlord, by his conduct during the term, has accepted other persons as his tenants, and by so doing has released the defendant. The expression of the chief justice, that there was no question for the jury, therefore meant that there was no question upon which the jury could entertain a reasonable doubt.

GURNEY B. concurred.

Rule discharged. (a)

(a) A parol assignment of a lease from year to year is void by 29 C. 2, c. 3, s. 3.; Botting v. Martin, 1 Camp. 318, cited 2 B. M. 270. , \$02 tenancy from year to year is not in general determined by a parol ite from the landlord to the tenant to quit he the middle of a quarter, Miles W. Brayne; 2 Camp. 103, unless the landlord takes pospession; to the seek : in efithe towart before a new year has begun, which it appears from Mar ning's Digest of Nis Prices Reports, 151, 2d edit., that he did not in Moles v. Brayne; and see Thomson v. Wilson, 2 Stark. C. N. P. 379; Dec . Hillet. 5 Taunt, 519, S. P. But his putting up a bill in the windste, dedictions procure another tenunti, Redpath v. Roberts, 3 Esp. C. N. P. 235, og inhie a fire and roasting a hare in the deserted apartments, Griffith v. Hedge, 1C. 1; \$4 P. 419, are not such "acta" of "entering and using the premises," to use the words of Abbott C. J. in the last case, as will deprive him a claim to rent for the year. Nor can a surrender by " act and eperation him take place under 29 C, 4, c. 3, except there be a written denier ! pew tenant, or he takes possession, Taylor v. Chapman, Peake's Addl Co 19. Merely taking rent from a new occupier seems not sufficient, though

Catt. School of and gentle on and breatter data session all quit see to niere peron white drew and the Editor Section oda rem " 10 brings". secretor dec La South of room or als A cater of the met west in de goods, a ado data d 20 16/17 12 the off by par

1834.

Regue ' v. BIRD.

ptwire given to him with his 100 oppypier, the original tanant, Guckine historium Hull, ante, Vol. III 1801. Sp. where the landlord after g an invalid notice to quit, put up the premises to be relet by auction, 111, 11290 3 (at. 100) et them, but the old tenant having been obtoid at the auction, refused 12,98 that the new tetrice was not let late possession & Bord I Huddle-Parishing Mediciliand on Honnigo's, Roll 141 ; S. R. Huddleston v. 4. B. & Cr. 922. And sec Brawley v. Wade, Machelland's B, 664; erten v. Stead, 3 B. & Cr. 478; Peter v. Kendall, 6 B. & Cr. 703. it where possession is taken by the landlord, by accepting the key the tenant, who removes with his goods in the middle of a quarter, Mital vi Ctiffant, il Bannt, 518; Grimmen v. Leggs, & B., & Cr., \$24; 1995; Brown v. Burtispham, 7. Direct B. 603; or by entering premises racent and reletting them to another tenant who takes possession, sv.4tcheson, 3 Bing. 462; or accepting another tenant then in possession seceiving lent from him, though obtained by distress, Thomas v. Cook, #2. C. 10. P. 468; 2 B. & Ald. 119, 8. C. 400, cited:supre, and Phipps witherper & H. & Ald. 199, S. P. (which seem to avertale Stone v. Whiting, 14. C. N. P. \$65,) it will be a valid surrender of the original tenant's est by act and operation of law. See also Matthews v. Sawell, 8 Taunt. However, the express consent of all parties to the change of tenancy ars also necessary; see the above cases.

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etraying possession.

or d. Ellebbrock and Others against Flynn.

JECTMENT for a messuage and premises, No. A termor, after 42, Cow Cross Street, Middlesex. The demises descring the demised preet hid on 1st October 1832; the first by Eller- mises, delithe second by James Phillips and wife, the possession of by James Phillips only. By the consent rule, them, with defendant defended as landlord, and the trial took party who before Gurney, B., at the sittings after last Miestas term. 200 4 3 The case for the lessors of the plaintiff was, that with intent enty years ago Cropley was possessed of the pre- to assist him as assignee of a mortgage for years by Eller- that title, and ald hold bona fide under the lease: Held, that the term was forfeited by the act

vered up the them, with the claimed by a title adverse to that of the landlord. in setting up not that he

Doe v. FLYNN.

brock, and had built a house at the back of them; that he devised to Broad in trust, and died possessed in 1830, leaving Jana Phillips his sister and heir at law. The defendant proved a lease dated 25th March 1831, by which Broad, described as sole executor of Cropley, agreed to let to Townsend, and Townsend agreed to take the premises described as late in the occupation of Cropley, for five years, from the 25th of March 1831, if the estate and interest of the said Broad therein should so long continue at 30, a year, Broad died in June 1831. payable quarterly. Phillips, the husband of Jane, recognized an occupation by, Townsend, by applying to him for the rent due under this lease, on 25th March, 1832, The lessors of the plaintiff, in reply, proved by Townsend that be having only paid a quarter's rent, and being afraid of a distress, deserted and looked up the premises 410 After he had, left, Flyen called on bim, to give them up to him, claiming them as his own property under an old title., Townsend said he was pressed for rent by the landlord. Flynn said he would bail him, and Townend, in June 1832, gave him up actual possession on receiving 5s., They also proved an affidavit of Flyn, made in an interlocutory proceeding in the cause, stating that he claimed this property adversely to the lesson of the plaintiff. Upon this evidence it was contended, that as the defendant defended as landlord, the could not set up the outstanding term in Townsend, who, under the circumstances, had so betrayed his landlord's title by giving up possession to Flynn, as to have thereby forfeited his lease. The learned baron having reserved this point, left it to the jury to say whether Townsend had given up the possession to Flung hor fide, in order that the latter might hold under the agreement, in which case they would find for the defendant; whereas, if they thought that he had deli-

Doe FLYNN.

vered up possession to Flynn in fraud of the landlord, and with a view to defeat his title by enabling Flynn to set up an adverse and better title in himself, their verdict should be for the lessors of the plaintiff. The July found that the possession was delivered up to Flynn by Townsend in fraud of the landlord, and gave a verdict for lessors of the plaintiff.

Plaint having obtained a rule pursuant to the leave reserved at the trial,

-EI Cresswell and Crompton now showed cause. The whestion is, whether the lease to Townsend was subsisting at the time of the demise laid, or had been forfeited by his act in delivering up possession to Flynn, in order the better to enable him to set up a title in Rimself adverse to that of the landlord. First, Flynn having come in under Townsend, is bound by his acts; and if Townsend could not insist on the existence of this lease, Flynn could not. Now in Bacon's Abridgment, tit Leases (T 2)(a) it is said, that "any act of the lessee by which he disaffirms or impugns the title of this lessor, occasions a forfeiture of his lease. For to every lease the law tacitly annexes a condition, that if the lessee do any thing that may affect the interest of his lessor, the lease shall be void, and the lessor may re-enter. of Besides, every such act necessarily determilles the relation of landlord and tenant, since to chim under another and at the same time to controwert his title, to affect to hold under him and at the same time to destroy that interest out of which that Tease arises, would be the most palpable inconsistency." That passage is fully borne out by Lord Redesdale's judgthent in Hovenden v. Lord Annesley (b), where it is said the act of a tenant in betraying the possession of his tendant, thereof than had self tail (it mod). (b) 2 Schoale & Lefroy, 624, 625. (s) Vol. iv. 219, 6 edit.

1884. Doe v.

lessor by consenting to admit the title of another, and thus disavowing the tenure is treated us working a forfeiture of the term, and entitling the least to puthin it by proceeding to eject him; not with stabling this leave; So, if a tenant for years make a febilihent with livery in order to gam the freehold, it is a forfeiture of the term, even though he should have first and good his term to a trustee with a view to protect against fonfeiture and attend the inheritance Lord Dorner vejectanes (s). Now the effect of the werdick his this base is that Townsend relinquished possession in favour of Flynn, to enable him to see up his take the prostion to that of the landlerd of Hord Lyndhurd Co Bunseented, adding, that fr was a conspiracy between Toloment and Flynn, in which the acts of the one were the acts of the other. Then it was not necessary that Tolonistid sterm should be surrendered in Writing under 2010. A clib was the by betraying the possession he had soudisolatingd the landlord's little, that he term, and with it his rights and a tenant, were gone yes that the question was san but forfeiture by not, and not of surrender under the sta-"tute of flauds: "For the same reason of clientainers are notice to quit would have been uninecessary; had Townsend been tenant from year to year; a doctrine laid down in Throumbeton V. Whelpdale (b); and recogmielicinu Doe du Williams v. Program (v)pur Dos d. Gradb vi Gradb (d); Due a. Calvert v. Froud (sw. That is because he would be a tement for veers in and Realty is as incident to his tenure as to that of a usual "for life! Older cases show that if a tenime for your "claims a larger interest than he has el grithe freehold, derogation of the rate of the eaten-Dur that will not

⁽a) 3 B. & C. 399, n.

⁽b) Buller's N. P. 96; B. R. Hil. 9 G. 3.

⁽c) 1 Peaks C. N. P. 259.

⁽d) 10 B. & C. 816.

⁽e) 4 Bing. 557.

⁽f) Dyer, 209 a. pl. 21; and see Co. Litt. 251 a, 252 b.

that forfeits the interest he has, viz. his term; Saunderait. Executan (a), Townsend's act was, incomistent with his, duty as a tenant; therefore, whether he attorneil ito attothen or betrayed the possession absort basely, he consily forfeited his term. The rule of law enthat subject is founded on foundal principles; accordit be which, every act tending to the lord's disinherisome do dron to alter the evidence of his title, as in the instance: of waste, was held to work a forfeiture. Thus the said in Wright's Townes (b), "Estates for life, beides that they are forfeitable by attainder and ceaser, re likewise, agreeably to the law of feuds, forfeited by rether and by all such acts as in the eye of the law and to divest or defeat the reversion or remainder, or no siny manner to pluck the seigniory out of the lord's iands;" for which Glanvil, lib. 9, cap. 1, p. 686, and Bracton, lib. 2, cap. 35, sect. 11, are cited. The same merails in copyhold; for if a copyholder swears in court that he is not the lord's copyholder, this is a forestare ipso facto (c). Relinquishing the possession nto the hands of Flynn, under the circumstances found; was a stronger act of disclaimer than attorning to him by matter of record (d).

Platt control. The term subsisted in Toursend at the time of the demise laid, unexpired and unforfeited. We act had been done by him to revest the demised premises in his lessor, unless his term was indeed forfeited. It may be admitted that any thing will amount to a disclaimer which shows assumption by the tenant of any estate above what the lord conferred on him in derogation of the title of the latter. But that was not

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Dos 2. Flynn.

⁽a) Litt. 367.

⁽b) 202, 4th ed.

⁽e) Coke's Complete Copybolder, printed in his ham Tracte, 132,

⁽d) See Co. Litt. 252.

Doe v. FLYNN. so here; for Mounsend, had, the cresidue of his fire. years unexpired, and might, admit any person into man, session during that period in By admitting Flynn he had only exercised other right; and at the same time; gave his landlord the advantage of an additional secur, rity for his rent, hyldistraining the egoods of floor A forfeiture cannot be worked by any act of disclaimer short of a precise and unequiveral acts by which he claims a larger interest than the landlord granted to him. [Lord Lyndhurst C. Bi, Townsend here delig vered the possession not it ather hands haf another merely, but to a party claiming by title paramount to that of the landlord, whom it therefore laid under fresh difficulties, by compelling him to make out his own title as lessor of the plaintiff in an ejectment.] ... A tenant's intention to cheat his landlord is no forfeiture, for an assignee of a lessor, may assign to a heggar to relieve himself from responsibility; Taylor v. Shum (a) Townsend's animus in delivering up possession is therefore immaterial, if he had a right to do it. there was no act of the lessor of the plaintiff to show that he intended to act on this lease as a forfeiture; for no entry or claim to the possession was made.

Lord LYNDHURST C. B.—The action being to recover the possession of demised premises, the defendant sets up this lease. The lessors of the plaintiff insist that it is forfeited; then why should they have entered? service of the ejectment was sufficient demand of possession (b).

On the main point, I think that the jury came to the

⁽a) 1 Bos. & P. 21; and see cases collected in notes to Wolveridger-Steward, ante, Vol. III. 640.

⁽b) See Adams on Ejectment, 2 ed. 141. The possession of Toussed, the lessee for years, being the possession of the heir, 1 Inst. 15 a; 3 Wils. R. 521; 7 T. R. 390; 8 T. R. 213.

Doe v. FLYNN.

the conclusion upon these facts. The act of the nant in setting up a title adverse to that of his landrd, morder to obtain the freehold, operates as a forlture of his term; and it appears to me to be the same, Bether he does so himself, or assists another to do it. "hether he this to get the freehold himself, or by Musion or connivence assists that result in favour of lottler, it operates equally as a forfeiture. In this ise the object of the transaction appears to have been give, of to the to give, an advantage to Plynn, in serting and establishing his alleged fitte." except, by the a party clauming by title paramenar of Borrand B. concurred. it months brother of the conneedless by compelling hear to make out his own ALDERSON B.—Had the lease been a freehold lease. try would have been requisite before bringing an ectment for a fortesture (a). Occol 5. 10 to 19 less of " we sum aft from responsibility: Taylor v. . ma (a) Gurrer B. concurred appropriate suprame shows or connected, it at had a right to do it. Besides reds a litturile out to result of Rule discharged. of the provided to act on this leader as a forth iture

(a) Co. Lit. 218. See Chomley's case, 2 Rep. 53 a.

vd Exemitasi (*, 1% - 1%), action being to receive passession of demised premies, the define a sets up tief lease. The lessors of the plaintiff is study in a fortential distance of the ejectment was sufficient demandered, service of the ejectment was sufficient demandered.

On the main point, I think that the jury came to the

[.] It Box, will be a considered in the soft reading $x_{\rm soft} = 0.00$

[,] which is the contraction of t

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A seaman entered into articles to serve on board the ship Royalist "bound from the port of London to the South Seas to procure a cargo of sperm oil; and to return therewith to the port of London, where the voyage was to end." Instead of wages he was to receive a certain share of the net proceeds of the cargo; and it that no one of the crew should " demand or be entitled to his share of the net proceeds of the said cargo, until the arrival of the said ship or vessel at London, and her cargo should be there sold and demoney for the

att to portuin odt doctiv becaused hirvel poor of the Crabbased Dinemaryog oil not oused dads qualification of Jesse, deceased, against Roy of the collection of the collection of the collection of the collection of Smith results in the collection of the collection

EBT by,, the administrator of a seaman, against the executors of the owner, of synesol, to recover the intestate's open ninety fifth where to full garge of sperm oil. The action was brought on garticles of agreement, between, W. Smith, the owner, of the ship Royalist, of the one part, and the master, officers, and crew of the said ship, bound from the post of London to the South Seas to procure a cargo of sperm oil &c. and other produce of the said seas, under the command of Thomas Hains, and to "return therewith to the port of London where the said intended voyage is to end," of the other part. The first stricle stated that in consideration of a certain share " of the pet sad clear proceeds of the cargo which shall or may be nocured, and brought in the said ship to Lendon then was stipulated the master &c., promised &c., to conduct her, with proper care to the said port of London, where the said intended voyage is to end. Secondly, That no one of the crew shall absent himself from the said ship or Thirdly, That the crew &c. of the said ship shall stand by the said ship in all ports and places, seas and danger. and shall and will at all times use and exert their utment skill and ability for the preservation of the said ship &c. and cargo, until she shall have arrived back at the port of London and her cargo shall be there wholly discharged. Fourthly, That no one of the crew shallneslivered and the lect his duty &c. nor go out of the said ship. Eithly,

same actually received by the owner." A cargo was propured, the ship was afterwards condemned in a foreign port, and the mariner accompanied part of the cargo on its homeward voyage, (it having been transhipped into another vessel the Alexander,) but died at sea :—Held, that said in the above articles, is a word of limitation of the mariner's right to wages, and not of postponement of payment of them merely: and consequently, that as the slip ad not return to London, the administrator of the mariner was not entitled to recover his ninety-fifth share of the net proceeds of the Royalist's cargo, but only to recover on a quantum meruit for his services on board the Alexander.

hat every lawful command which the master of the id ship shall issue for the government of the said ship c. shall be attended to. Sixthly, That no one of the id officers and crew shall demand or be entitled to his the of the net proceeds of the said cargo until the rival of the said ship or vessel at London, and her irgo shall be there sold und delivered, and the money r the same actually received by the owner, nor unless sishall have well and truly performed the above mensmed woyage, according to the true intent and meaning National articles. Seventhly, That in ascertaining the st proceeds of the said cargo upon the completion of we will voyage, vertain charges (therein specified) shall Eighthly, That every one of so crew who shall not return in the said ship with his ited (except in the case of death), or who shall desert, resider into his majesty's service, without the consent f the commanding officer of the said ship, the Royalist, the time being &c., who shall plunder &c. any thing clonging to the said ship, or the owner &c. thereof, hall thereby forfeit the whole of his share of the said argo are and all benefit from the said voyage. Winthly, Phat the owner may sell the said cargo, or any part believel, at any time, and for any price and upon such seem as he shall think fit, and either upon credit or therwise, and either before or after the arrival of the aid ship in the port of London. Tenthly, Owners may sduct from the shares any debt. Eleventhly, In case of he death of any of the crew, the executors &c. are not be entitled to more than the deceased's share of the by proceeds of such part of such cargo as shall have con obtained while the deceased party was personally erving on board the said ship or vessel. Twelfthly, That person should have a claim for any wages, save his have of the net proceeds of the said cargo to accrue p him under these articles. The intestate left the port JESSE 9. Roy. JESSE v.
Roy.

of London in the ship Royalist in June 1829, on a whaling adventure to the South Sea, and there the ship completed her cargo of 148 tons On their voyage homewards, after having, in consequence of disesters, been compelled to put into several intermediate ports, she was repaired at Manilla, and the captain was obliged to sell 22 tons, part of her carge to pay for her repairs. She was afterwards, so, much damaged at sea; that she was carried into a foreign port in the Islands Timor and condemned, and the remainder of her cango was transferred to two vessels, in order-toybe strought to The intestate, who was cooper's mate, performed all the articles to the satisfaction of the captain, assisted in transhipping 91 tons, part of the cargo, to the Alexander, and went on board that ship with that part of the cargo on his royage to England, but died at sea in November 1832, a short time before she arrived array they would be conticed. They do not

Comyn for the plaintiff. In this case there are three points for the consideration of the courts. First, Would the plaintiff be entitled to recover generally one ninetyfifth lay share of the carge, Secondly, Is the restrictive clause in the articles a condition procedent, on only a clause for postpoping the payment of the orages. Thirdly, If the plaintiff is entitled to recover generally, is his lay share of the proceeds subject to contribution for freight for bringing home that cargo As to the first point the crew are entitled to their lay share, do the cargol except such part, as was sold; has arrived in port, elthough the ship has not The sailors book to the cargo for their remuneration, for the wayage, not to the ship and stores, which are under the control of the captain, who represents the owner; else, if the sailors' earnings depended on the return of the ship, either the owner or the captain, by choosing to change the ship, might deprive the crew of

Jesse v. Roy.

ir wages, if they depended on the return of the ship. ord Lyndhurst C. B. The captain cannot, by any tyof his own deprive a sailor of the benefit of his ntract, as for instance, if he discharges him improrly on the woyage, he is entitled to his full wages. he sells the ship over which he has control.] Where impster hires emother ship, into which the cargo is ipped and so brought home, he is entitled to freight, d the sailed to wages last if the voyage was completed the first. " Lord Dynakurst C. B. If a vessel is lost mindidle voyage, and there is a contract for wages for e, whole voyage, the seaman loses his wages, with one time exceptions as when part of the vessel is saved, has a lies on that part which he has contributed to we, and for salvage but for wages. Freight is earned the cargo arrived though it may not complete the ryage in the same ressek Lyde v. Luke (a) and Cooke **Jennings**(b) show that in the absence of an express intract they would be entitled. [Lord Lyndhurst C. B. m wessel is lost and the targo saved and put in another mael/the owner is emitted to freight, but are the seaentiontitled to awages?) If they follow the cargo, addinateights is entered by their exertion, they are: piomer has had the benefit of their labour, and the show greaten to the sailor ; for though the owner can minethis freight, the seamen cannot insure their wages. Keleten in De Fastet (c) Lord Lyndhurst C. B. That riquining would equally apply to the case of a total loss hereothe seaman loses his wages, though the owner, if dichigometrito inquire, suffers no loss, as he may come pen the underwriters. Here the owner receives the asgonable the seaman has received no wages: there se owner receives the value of the cargo, and pays no wices. I .. In the case of a total loss, the seaman has not (Public 882 1 m. Ri 190. S. C. Carte , que cale a conse (6) T. R. Burry & Marie (6) T. R. 480 (1 to 1 to 6)



earned his wages; that is not so here; where the cargo has been brought home. And if wages would be due generally, as it is stipulated by the last clause in the articles; that the crew are to be paid, not by wages, but by lay shares, the plaintiff must be remunerated in the way provided for by the articles as to the second point. I The descadants rely on the sixth clause of the articles, "That no one of the officers and knew shall demand or be entitled to his share of the net proceeds of the said cargo until the artival of the ship or westel at London, and her cargo shall be there said and delivered and the money for the same actually received by the owner &c." But the whole articles must be looked to for the true construction of that clause, which will/depend on the nature of the adventure, the object of the voyage, and the peculiar contingencies that must have been in the contemplation of the parties. "The words of a condition shall be liberally expounded to serve the intent of the parties;" Com. Dig., Condition (E.), and 4 it is sufficient if the substance of the condition be performed;" ib. (G, 14)(a). The object of the voyage was to obtain sperm oil, and the substance of the agreement is, that the cargo should be delivered in London, not that it should arrive in any particular ship there. [Bolland B. The plaintiff then reads "ship or wessel" in the sixth clause, as if written figurgo" in the articles.] ... The articles contemplate in other parts the contingencies of the voyage, and it would be monstrous that the condition should be interpreted to mean that at all events the ship should arrive. The

⁽a) There are no precise technical words required in a deed to make a stipulation a condition precedent or subsequent: for the same words have been construed to operate as either the one or the other, according to the nature of the transaction. The question must depend on the nature of the contract, and the acts to be performed by the contracting parties; Hethem v. East India Company, 1 T. R. 645.

intent of the parties gives the rule of construction, as in Beales v. Thompson (a), where the mariner stipulated in the articles that he would " not be on shore under any pretence without leave before the voyage was ended," but was detained on shore six months by the hostile act of a foreign government in the nature of an embargo; and Lord Ellenborough said, "It is material to observe that the being on shore here meant is, by reference made in the articles to the statute 2 Geo. 2. c. 36, and 37 Geo. 3. c. 78, and the penalties imposed thereby, a being on shore analogous to that which is the object of penal restraint and correction under those statutes, vis. a departure and absence from the ship by the unauthorized act of the party kimself?" Yet here, where the substance of the contract and the reasonable intent of the parties is satisfied, the defendant contends that the gesman is estitled to nothing. [Vaughan B. That is, to nothing on the articles: the court has no doubt that he is entitled for work and labour on a quantum meruit for the voyage in the Alexander. Lord Lyndhurst C. B. The difficulty is to get out of the terms of the contract; that is the ground of decision in Appleby v. Dods (b). In Appleby v. Dods there was an intermediate voyage, and the ship having been lost on the homeward voyage, the mariner was held not entitled to his wages pro rath on the outward voyage, though freight had been carned on it. That was so held on the policy of state 37 Geo. 4. c. 73. (c), which statute Lord Stowell, in a subsequent JESSE v. Roy.

⁽a) 4 East, 546. (b) 8 East, 300.

⁽c) That act is entitled "An act for preventing the desertion of seamen from British merchant ships trading to his majesty's colonies and plantations in the West Indies." After reciting that "seamen and mariners, after entering into articles to serve on board British merchant ships during the voyage from Great Britain to his majesty's colonies and plantations in the West Indies and back to Great Britain, frequently desert in such colonies."



minerion or me tight. LUCIU LYMONES OF judgment of Lord Stowell begins, "this is a age, in which cargoes successively taken in a at different ports, earned freight for the ow port of delivery by the known general law; same general law, wages were earned by tl and freight had been earned in three preced to New South Wales, Batavia, and Bengal." In Appleby v. Dods the articles were 1 monthly wages in a ship bound for the ports or any of the West India Islands, and Je return to London: and the seamen were no or be entitled to their wages, or any part t the arrival of the ship at the port of discha Ellenborough said, "The terms of the sti general and include the present case, and say against the express contract of the par seaman shall recover pro ratâ, although the did reach the port of discharge named." In that case freight was earned to Madeire West Indies, but not wages.] In two anonym where the voyage had not been completed port, but there were intermediate ports of was held by Lord Holt that the sailor was wages to the port of delivery last before the loss, and his opinion was confirmed by a cor

1834.

JESSE

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Roy.

Batterder ve Child (h) 20 As to the "third point, the Linan has no interest in the ship, his wages depend " ireight belig enmed, and as the Bull amount of aght was received, and he wished to bring home the sihis ishatei upikhe leafningsitis' tiotisubjectito dection in respect of the value of 22 tons of oil, which de sold to pay for repairs (b). Ingir out ?

of word Stouctl begins, 'this is a divided vo. Shee for the defendant of As to the second point, the cintiff cunner claim wages on the quantum dieruit for I labour in the second is my consistently with the acted of agreement, or of he can, the articles of regarent publications opensidered national end. Lord Addition C. By There is an end to the claim for when the skilor is lost, therefore the skilor is to he before contract for the duty which he did in the resuch The involved contract can arise only written contract is at an end, but the plaintiff withit bringing home the vessel is a fulfilment of the mtract. Flord Lyndhurs C.B. The first transaction over. The plaintiff says either the contract endured, disherefore I am entitled to my stipulated share, or with then the contract is over, and I am entitled on . community and a state of the Butthe Past clause of the siles empressly prohibits the plaintiff from recovering with the mode than is there specified (e)! Then no ionbtothe and descriptions in the taken together, and he singly in which they were understood at the time! mit be circulared in the imposition of such reduction i

o) beliated size rolling out that had bro. I yet blod size (c) \$ Vern. 727. That was a bill filed against the owners by the executed the captain, to be reimbursed the sums of money which he had bed supported to pay the tailors for trages; by the decision of Lord Hote? wing him, in the case reported 1 Lord Raym, 239, The Chancellos de- ... creed that the owners should pay.

⁽b) It is believed that this point was conceded by the defendants; nor was it necessary to decide on it. and the graph of the contract of the

⁽c) See Eakin v. Thom, 5 Ksp. 76 ; 1/ 2 ; we what make it from TT

VOL. IV.

JESSE v. Roy.

But if the terms made use of are plain, the court will not supply an intention to the parties; that is not consistent with the expressions, "Quoties in verbis nulls est ambiguitas, ibi nulla expositio contrà verba expressa fienda est." In Rickman v. Carstairs, there was no doubt that it was intended that a policy should protect a vessel on a voyage to Africa, but as the intention was not plainly stated in the policy, the court would not give it effect. The contract for seamen's wages must always be strictly construed; for though any other contract for service may be verbal, this by 2 Geo. 2. c. 36. must be in writing, "in order to prevent the mischiefs that frequently arose from the want of proper proof of the precise sums upon which they engage to perform their service in merchant ships" (a). The important clauses in the articles from which the contract is to be gathered, are the sixth, coupled with the seventh and the twelfth; all the other clauses are merely confirmative. In the sixth clause "until" must be understood as "unless," and the other clauses are consistent with that construction. The clause enabling the owner to sell elsewhere, is an exception, and does not control the clause so as to prevent the construction. that the plaintiff shall not be paid unless the ship arrives in London and the cargo be there sold. [Vaughan B. It seems to be inserted to enable the master to decide on the expediency of finding a good market before the ship arrives.] The seventh clause as to the distribution of the proceeds, is on the supposition of a safe arrival of the vessel: it begins "that in ascertaining the net proceeds of the said cargo upon the completion of the said voyage, there shall be charged by the owner &c." There is no provision for any probable loss. The first five clauses, which relate to the duty and liberty of the mariners, on each of

⁽a) Abbott on Shipping, 433, 5th edit.

ch an action would lie for breach of duty, all refer he ship Royalist. [Gurney B. Does any contract seamen's wages apply to any ship except that on ich they embark? No: but this is more of a partship adventure(a) than a contract for wages, and re is no authority for saying it is not an insurable The object of it is not a service by the ors as hired servants, but to contribute their labour capital in a joint adventure, and to have an interest the profit depending on their exertions. All parties stemplate a risk. The object of the owners is the ety of the ship, and for this purpose they make the nuneration contingent on her return in safety; the winers are content to run that risk, in the hope of a saible profit in a ninety-fifth share. If the construcon which the defendant seeks is not to stand, the rds "to be brought in the said ship" must be erased m the first clause; and in the sixth, instead of "the ival of the said ship or vessel," the arrival of the go must be supplied. The same public policy ch makes the wages of sailors not insurable, sancs this construction of the clause, in order to insure best exertions of the crew for the safety of the * a " for if the mariners had their wages where the perishes by tempest, they would not use their envours nor hazard their lives to save the ship(b)." >re is no pretence for imputing fraud or oppresin these articles, and it appears by the articles The fishers in Holland(c), that such a stipulation mot considered unreasonable by the mariners reselves; "for as in the whale fishing trade, the p goes out clean and returns full, the salvage is

Wilkinson v. Frasier, 4 Esp. 182, semb. cont.

^{) 1} Sid. 179 and 236.

c) See Scoresby's Voyage to the Arctic Regions, vol. ii. 272, cited in Ament.

JESSE v. Roy. so high that it is not worth while, it is therefore reasonable that the captain and crew should have nothing on the goods." But if there is any hardship in the contract, it is not greater than in cases where the owner cannot recover any freight because the ship has not arrived at a stipulated port of delivery, as in Cook v. Jennings (a), which was an action of covenant on a charter-party of affreightment on a ship from Liverpool to Wyburgh, and back to Liverpool; the freight to be paid, one-fourth in cash on her arrival, and the remainder by bill, accepted at four months. The ship was lost, after having performed great part of her voyage homewards. but before her arrival at Liverpool; and Lord Kenyon in giving judgment said, "the question is, whether or not the owner can enforce payment of the money under this contract, not having carried the goods to Liverpool, and the defendant having only undertaken to pay on their delivery at Liverpool; in answer to this action the defendant has a right to say, " non hæc in fædera veni." So, in Bright v. Cowper (b), where the covenant was, that if the plaintiff would bring his freight to such a port, the defendant would pay him such a sum, and part of the goods were taken by pirates, and the residue were brought to the place appointed, the court held that the defendant ought not to pay the money, because the agreement was not performed. As to the owner being able to insure his freight, he buys his indemnity with money; the mariner would be in the same state if a like deduction from his wages were made for an indemnity, but he has no right to complain, as he pays no premium. This is conformable to the legal principle on which wages depend, for if freight is the mother of wages, safety is

⁽a) 7 T. R. 381.

⁽b) 1 Brownl. 21, cit. Abbott on Shipping, 319, 5th edit.

he mother of freight; and the ship not having arrived a safety at London, her port of discharge, no freight is ue, and as wages depend on freight, the articles do no more than the common principles of law, and no rages are due. Where a ship set out on a trading to yage to the coast of Africa, and thence to America, but before that was to cruise as a privateer, an officer who had engaged to serve on board for certain monthly wages during the voyage, one half of them to be received at the port of delivery in America, and the other at the port of discharge in Great Briair, and also for a share of all prizes, admitted by him have been received, was held not to be entitled to y part of the wages, where the ship was taken before completed her voyage, although he had been sent of her before her capture, as prize-master on board ze taken in the voyage; Lord Mansfield saying, ac question is, whether the plaintiff can now make demand, in the nature of wages, for the time he the care of the prize. The ship sets out in a e capacity, she is to perform a trading voyage, before that she is to cruise three months as a prier; all demand on account of the trading voyage is **ne**; but in her character of privateer the crew are titled to no wages; they all run equal risks, and take chance in their respective shares in prizes;" Aberv. Landale(a). So in Vin. Ab. tit. Mariner, • $\mathbf{2}$ pl. 15(b)." If the ship do not return, but is lost tempest, the mariners shall lose their wages, for herwise they will not use their best endeavours, nor **Eard** their lives to save the ship." So, where a allor contracted to have wages provided he proceeded, continued, and did his duty as mate in a ship from Jamaica to Liverpool, but died before the voyage ended; it was held that no wages could be claimed,

JESSE v.
Roy.

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either on the contract or the quantum meruit; Cutler 'v. Powell(a). These cases show there is nothing unreasonable in the stipulation, because, if there had been no articles, the principles of law would in the same manner restrict the seaman from recovering his wages. Where the contract was for a voyage to Newfoundland to take in a cargo, and thence to Spain or Portugal, or some part of the Mediterranean, and the ship was taken, after loading at Newfoundland, but before its arrival at any port of delivery, it was held that the contract was entire, and no freight nor wages due; Hernaman v. Bawden(b). This case, by substituting "the South Sea" for "Newfoundland," exactly resembles that. But Appleby v. Dods is conclusive in favour of the defendant, and it is stronger than the present case, because freight was there earned for the intermediate voyages, and therefore wages would have been due, if they had not been excluded by the express terms of the contract. There is nothing in the judgment of Lord Ellenborough to show that the case depended on 37 G. 3. c. 78. but on the terms of the contract, which were general. [Vaughan B. The articles are in a schedule to the act, 37 G. 3. c. 73.] Then we have the sametion of the legislature as to their form, and they are treated as generally applicable in Abbott on Shipping(c). [Gurney B. The statute makes it peremptory in voyages to the West Indies, and then the parties in other voyages adopt them.] In Beale v. Thompson(d) the freight had been earned, and because the absence of the seaman was involuntary, it was held that he entitled to wages. [Lord Lyndhurst C. B. Suppose that in the ordinary case of a charter-party the ship in lost, and the cargo transhipped to another vessel, would not be bound to pay freight on the charter-party.

⁽a) 6 T. R. 320.

⁽b) 3 Burr. 1844.

⁽c) Appen. 493, 5th edit.

⁽d) 4 East, 546; 1 Dow, 299, S. C.

JESSE v. Roy.

nut on the implied contract; for if the goods are acepted, it has never been disputed that the owner rould be liable to pay freight for them, though by heir having been shipped in another vessel by the aptain, it may happen that the charter-party has not been complied with.] But it has never been decided that if the ship is lost the freight is payable. [Lord Lyndhurst C. B. Freight would be paid on the implied contract, if the goods are delivered by another ship, though it has not been earned under the charter-party.] Here there is a written contract; the plaintiff cannot resort to an implied contract. [Gurney B. Though strictly Peaking no freight is here earned, the owner has, by the oint adventure, to receive a value which is equivalent to be freight, for the use of the vessel fitted out. The dendant must stand on the express words of the con-The defendant relies on the words, and the ove cases were cited in answer to the suggestion of rdship to the plaintiff, because they show that it is sonable that wages should not be due, where ight is not earned. Lord Stowell(a) calls such sti-Lations illegal, citing Buck v. Rawlinson (b), to show the Admiralty Court decided, that even where the men had given bonds to the master not to demand Y wages unless the ship returned in safety from a Indies, and she was lost in the regley, after delivering part of her outward cargo, they were still entitled to wages for the outward Tage," and he says the payment to the mariners was med by the House of Lords; but the question bethe House of Lords was, whether the lord keeper had properly dismissed the bill of the captain winst the East India Company, the owners, for reimbursement of wages which he had been compelled to

⁽⁴⁾ In the case of the Julians, 2 Dods. 211; 2 Bro. Parl. C. 102.

⁽b) 1 Bro. Parl. Cas. 137.



pay by the court of admiralty. [Vaughan B. They reversed both orders, and gave leave to appeal to the delegates.] Lord Stowell also relies on Edwards v. Child(a), in which Lord Holt was said to have decided in the same manner as Buck v. Rawlinson, but that was a divided voyage. On both these cases it is observed in Abbott on Shipping (b), that the author was at a loss to find any principle upon which a court of admiralty could have held these bonds to have been void, or have thought seamen entitled to more than a proportion of the advance money, unless the bonds were deemed to have been obtained by oppression or fraud. Again, the judgment of Lord Stowell in the case of the Neptune(c) is not consistent with that in the case of the Juliana (d); he says, "The maxim that freight is the mother of wages, though generally received like most other maxims delivered in figurative terms, certainly is not formed with real and strict accuracy. For the natural and legal parents of wages are the mariners' contract, and the performance of the service covenanted therein; they, in fact, generate the title to Here, then, he admits that the wages are controlled by the contract of the parties, and differs from himself in the case of the Juliana, "where," he says, "the payment of wages is generally dependant on the payment of freight; if the ship has earned its freight, the seamen who have served on board the ship have in like manner earned their wages; and as in general, if a ship, destined on a voyage out and home, has delivered her outward-bound cargo, but perishes in the homeward voyage, the freight for the outward voyage is due, so in the same case the seamen are entitled to receive their wages for the time employed in the outward voyage, and the unlading the

⁽a) 2 Vern. 727.

⁽b) Page 448, 5th edit.

⁽c) 1 Hagg. 227.

⁽d) 2 Dods. Adm. R. 504.

cargo, unless by the terms of the contract the outward and homeward voyages are consolidated into one. to until, it is not a term of postponement, but a condition precedent. [Lord Lyndhurst C.B. It is clear from the schedule to 37 Geo. 3. that it is not intended by the legislature to be a postponement, and as the words of the agreement are adopted from the statute, they therefore must receive the same interpretation.] Lord Stowell, upon these contracts, observes:—" Mr. Bell seems to think that if the agreement were more clearly expressed it would be held effectual in Scotland. probability of such an expectation is not, I think, fortified by what immediately follows, that in the case of Ross v. Glassford, in which the party founded upon a custom in a particular port to make such agreements, the court declared, that if such a practice did exist, it was highly to be disapproved of, as fraught with inhumanity, and destructive to trade, and that it was time it should be corrected. If so, clearness of expression for such a purpose would not be likely to facilitate its reception." [Lord Lyndhurst C. B. Mr. Bell cites Morrison v. Hamilton as an authority for the limitation of the right. The point in controversy is about " unless" and " until;" if unless were inserted, it would not be a mere suspension of right. Stowell cites Bell as a text writer, but relies on the Scotch cases. The balance of authorities stands thus: the Scotch courts are equally competent to put a construction on articles as our courts are. one side Appleby v. Dods is decided, on the other, Morrison v. Hamilton, together with that decision by Lord Stowell. The point which weighs with me is, that in Appleby v. Dods, where it was decided that the construction of the articles in stat. 37 Geo. 3. c. 73. is that which the defendant contends for here, so that when these words are adopted from the

Jesse v. Roy.



tween the courts of admiralty and comm since the time of Ric. 2. and caused the st. 1. c. 5., and 15 Ric. 2. c. 8. to define the admiralty jurisdiction(c). Since these cognizance of that court has generally bee prohibition; the Mariner's case (d), Opy Day v. Serle(f), Anon.(g). In the Juli the court of admiralty decided that a bone the payment of wages conditional, on the r ship to the port of discharge, was illegal; h which is begun there on the agreement t under seal, a prohibition shall go to the adr Howe v. Nappier(i). The case of the Ju fore, was coram non judice. [Lord Lyn The parties did not dispute the jurisdicti case is coram non judice if the judge h diction to decide, though the parties do 1

(a) 2 Dods. Adm. R. 521.

"though the charter-party is so penned that nothing can

⁽b) In Edwin v. East India Company the charter "that until six days after the ship shall have returned London, and made a right and full discharge of all her ladi are not to pay, nor to be liable to any of the sums of mon freight," it being the intent of the parties that if the shi either in her outward or homeward-bound voyage, nothing by the company. The ship was declared not seaworthy port of discharge, and there left. The Lord Chancellor &

JESSE 7. Roy.

that defect. [Vaughan B. The judge also administers justice to a sailor by a different standard than to other people, because he says nauta non legit ut chericus.] Therefore the parties are bound by their contract according to the common understanding of the terms. Pothier says there are four modes of hiring seamen, one by the voyage, the second by the month, the third by the profits, the fourth by the freight, and only those engaged under one of the first two modes are entitled to recover wages.

Comyn in reply. Howe v. Nappier does not affect the question, because as the owner did not move for a prohibition the jurisdiction of the court was not disputed. Neither do the cases cited touch the construction of this clause, because they are all on articles applicable to the voyage in each particular case; and, except in Cutler v. Powell, the voyage out and home had not been performed; but here, the voyage to the South Sea and back to London has been completed, and the cargo when delivered has been accepted. In Cook v. Jennings (a), the vessel never reached Liverpool, where the cargo was to be delivered. [Lord Lyndharst C. B. There the action was on the charterparty, and it was decided that such action did not lie. because the terms of the charter-party had not been The only case decided on this clause, which is adopted from the stat. 37 Geo. 3., is the case of the Juliana, and that is expressly with the plaintiff; Appleby v. Dods was decided on a different point. This has been assimilated to the case of freight, which it is said would not be earned; but on these articles freight would be earned when the cargo has arrived and been accepted. [Lord Lyndhurst C. B. If that is so, wages necessarily follow.] The word until is

along array and the later of the Company of the Com



performed his duty by midding another cargo has arrived, an action may be main freight. The safe arrival of the cargo of the contract, and it would be suffici neral rule that the performance of the s contract is enough, even in words of con Dig. tit. Condition. In Appleby v. Do about desertion makes the distinction bet formance of the voyage and the arrival of ship; though in that case there were voyages, the substantial agreement was out and home. [Lord Lyndhurst C. B. in which the party would have been ent for the voyage had it not been for that the decision of the court in Appleby v. that clause is against the plaintiff's cl case the "port of discharge above mer have meant London. There are precis words quoad this question; there we voyages, and freight earned at three p stildr would have been entitled to wag of them, though the ship was lost on from the third place.] The contract th no seaman should be entitled to his wager thereof, until the arrival of the ship. I material words to exclude the mariner from

thereof," was, that the voyage was divisible there, it is not so here.] The whole voyage is performed, though not in the same ship. [Lord Lyndhurst C. B. The intermediate voyage was performed in Appleby v. Dods.] "Any part thereof," are very material words to exclude the mariner from recovering wages for intermediate voyages, to which he would have been entitled if that had been struck out. The case of the Juliana has been treated as an authority by the American courts since Appleby v. Dods, and is recognized in p. 488, of an edition of Abbott on Shipping by Judge Storey, who cites Johnson v. Sims, Peter's Admiralty Reports, and Swift v. Clark, 15th Massachussett's Reports.

Cur. adv. vult.

The judgment of the court was now delivered by Lord LYNDHURST C. B.—This was an action brought by the administrator of Jesse, a mariner, to recover a sum of money claimed to be due for services on board a vessel called the Royalist, while on a whaling adventure to the South Sea. By the articles it was stipulated that the intestate should receive a certain share of the net proceeds of the cargo, which should be procured and brought in the said ship to London. In the articles were the following stipulations, on which the question turns:-"That no one of the ship's company shall be entitled to his share of the net proceeds of the said cargo until the arrival of the said ship at London, and her said cargo shall be there sold and delivered, and the money for the same actually received by the owner; nor unless he shall have well and truly performed the above-mentioned voyage according to the true intent and meaning of these articles." The vessel proceeded on her voyage in the summer of 1829, and procured a cargo of oil, but was so much damaged by tempesJESSE v. Roy. JESSE v. Roy.

tuous weather, that when taken into port in the late of Timor, for repairs, it was found impossible to repair her there or elsewhere, and she was in consequence condemned; some part of the cargo had been sold before to pay for repairs at Manilla, but what remained after she was condemned was transhipped into two vessels; one part into the Hope, the other part into the Alexander, that came by way of Batavis. The intestate embarked with that part of the cargo which was put on board the Alexander, but died before the ship reached London. The question is, whether, under these circumstances, his administrator can recover his wages? Now that right depends entirely on the contract; and I know no principle by which a contract entered into by mariners is to be construed differently from those made among other persons. The language here is clear and distinct, that he is not to receive his share of the cargo till the arrival, not of the cargo only, but of the vessel, in the port of London; and we are of opinion, that in this contract this administrator is not entitled to recover. Nor is this the first time that the question has been brought before a court; for the stipulation in Appleby v. Dods (a) is in substance the same as the present. That was a voyage "for the ports of Madeira, any of the West India islands, and Jamaica, and to return to London, at monthly wages; and it was agreed that no seamen should demand or be entitled to his wages, or any part thereof, until the arrival of the said ship at the above-mentioned port of discharge." The ship sailed with a full cargo to Madeira, and thence to Dominics, and afterwards to Kingston and the West Indies, Port Antonio in Jamaica, and then proceeded to Marth Bray, in the same island, delivering goods and taking

Jesse v.
Roy.

a new cargo at each port successively, and earning reight in the first two stages of her voyage. hip set sail from Martha Bray, her last port of devery in Jamaica, but was lost on that her homeward oyage. It is clear that, independently of any express tipulation, freight having been earned at each port of elivery, the mariners were in that case entitled to rages pro rata. The question was, were the mariners ntitled to wages in such case, notwithstanding the ontrary stipulation in the articles, the terms of which rere, that "no seaman &c. shall demand or be entitled p his wages, or any part thereof, until the arrival of he said ship at the port of discharge, and her cargo chivered?" At first, at nisi prius, Lord Ellenborough hought the stipulation so precise that the mariner ould not recover, and accordingly nonsuited the plainiff; and on motion for a new trial the court of King's Bench confirmed his opinion, being clearly of opinion hat the stipulation was express and precise; that unces the ship arrived in London the mariners were not intitled to wages. But in opposition to this case, which was decided in a court of common law, the nase of the Juliana in 1822 (a) was quoted, in which Lord Stowell, then judge of the court of admiralty, n delivering his judgment drew a distinction beween courts of common law and a court of equity, n the following words: "A court of common law vorks its way to short issues, and confines its view to A court of equity takes a more comprehensive new, and looks to every connected circumstance that might to influence its determination on the real justice of the case. This court does not claim the character of a court of general equity, but it is bound by its comnission and constitution to determine the cases subnitted to its cognizance upon equitable principles,



rence v. in appecy v. Dous (v), mai me me entitled to recover according to general princ Again, Lord Stowell misunderstood the pleby v. Dods, in supposing that that dec on its being a West India voyage; that tl stance formed no ingredient in the judgme from the words of Lord Ellenborough:--" of the contract are quite clear and reason though the reason of this stipulation was r oblige the mariners to return home with th not desert her in the West Indies, yet the are general and include the present case; a not say against the express contract of t that the seamen shall recover pro rata, alt ship never did reach her port of discharg That decision then turned not on the nat voyage, but on the large and express terms tract. As to Buck v. Rawlinson (c) and 1 Child (d), which are cases decided in equity tremely difficult to learn from the reports the grounds of the decisions; but enough at them for us to see that they were decided ciples of equity, and not on any data binding of law. This question being agitated her decided on principles applicable to these c as the clause is clear and distinct, the plain ices since performed in the Alexander, it is admitted the plaintiff is entitled to recover on the quantum ruit count.

1834. Jesse Roy.

Judgment for the defendant on the special counts.

Doe on the demise of GILLETT against Roe.

MANSEL moved to set aside a declaration in eject- A declaration ment and the service thereof, for irregularity. The in ejectment must begin declaration was of Easter term, entitled generally (a) of and conclude that term, beginning, John Doe, a debtor to our soveminus clauses, reign lord the king, comes before the barons of his as before 2 W. majesty's exchequer &c., and concluded to the damage uniformity of the said John Doe, whereby he is the less able to of process satisfy &c. He contended that the declaration should ral rules of have been according to the form in Reg. Gen. Mich. 3 Mich. term 3W. 4. No. 15. W. 4. No. 15. [ante, Vol. III. p. 5.] A. B. by E. F. not being aphis attorney, complains of C. D. who has been summoned, &c. For the direction is general, "that every merely perdeclaration shall in future commence as follows." Hirst v. Pitt(b), this court held the old jurisdiction by quo minus to be at an end, since 2 W. 4. c. 39. c. 14., the uniformity of process act.

4. c. 39. the act, the gene-

PARKE B.—The action of trespass and ejectment is a mixed action. Now the rules of Michaelmas term 1882 are rules agreed upon by the judges in pursuance of the statute for the uniformity of process 2 W. 4. c. which statute is intituled "An act for the uniformity of process in personal actions in his majesty's courts

⁽⁴⁾ This was also contrary to Reg. Gen. M. 3 W. 4. No. 15. ante, Vol. III. p. 5.

⁽b) Ante, Vol. III. 264.

1834. Doe ' 10.

ROE.

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of law at Westminster." Then that act applies to personal actions only, and not to ejectments; the general rules which were framed in order to enforce that ac only cannot have a larger operation.

di to Rule refused. · 1, . . .

FIDGETT against PENNY.

A plaintiff sued on an account stated on the 5th February, the balance of which was in his favour. The defendant sought to give in evidence a count stated on 10th March, in which the balance was against the plaintiff. Held, that as the action was commenced after the new general rules of Hil. 4 W. 4. came into operation, the defendant could not prove the second account stated, on the plea of only, but should have pleaded payment or a setoff.

SSUMPSIT for money had and received, and one an account stated, brought since the rules (Regular Generales) of Hilary term 4 W. 4. came into operation -Plea: non assumpsit. The particulars of demand were for a balance of money due to the plaintiff, on an account stated with the defendant on 5 February. trial was before the secondary of London under a subsequent ac- judge's order, pursuant to 3 & 4 W. 4. c. 42. s. 17. The plaintiff having proved an account stated with the defendant on 5 February, sought to recover a balance which appeared due to him thereon. The defendant, on the other hand, opened that on the 10 March another account was stated between the parties, including the items of the former, and also a sum due from plaintiff to defendant, which turned the balance due against the plaintiff. For the plaintiff, Reg. Gen. Hil. 4 W. 4. relating to pleadings in assumpsit, No. 1. [see pp. xiv. xv. in this Vol.] having been cited, it was objected that the defendant could not give the second account stated in evidence, under the general issue non assumpsit, and the secondary having ruled accordingly, the plaint non assumpsit had a verdict for the balance due on the first account stated, with liberty to the defendant to move to set it aside, and enter a verdict for the defendant. A rule having been obtained according to the leave reserved, and also for a new trial.

IN THE FOURTH YEAR OF WILLIAM IV.

Butt who was to show cause was stopped by the Durt; who called on



Heaton to support the rule. The general issue in fact raied the particulars of the plaintiff's demand. The second account stated showed that at the time of the tion brought, the plaintiff had no right of action rainst the defendant on the first account stated, which relied on. Then it should have been received in idence. If this be otherwise, the plaintiff may always bely on the first account stated, in which the balance is his favour, notwithstanding a series of subsequent recounts, on which he is a debtor.

Lord Lyndhurst C. B.—The day in the declaration immaterial, but the particulars of demand fixed the ime when the first account was stated, and showed the efendant that the action was brought on that account. The plaintiff then had a clear cause of action, to which be defendant set up as an answer, that on a subsequent ecount stated, including the former items, the balance in his favour. Then payment might have been leaded(a), or if the new items did not form part of the ecount stated, they were a distinct demand on the demandant's part, which might have formed the subject of plea of set-off. But, since the rules of Hilary term here is no answer to this action, under the plea of non ussumpsit.

ALDERSON B.—The defence on the second account, ras either on the ground of payment or a set-off, neither which could be given in evidence under the general least.

GURNEY B. concurred.

Rule discharged.

(a) See Reg. Gen. Hil. 4 W. 4. Pleading in Assumpsit I. No. 3.
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1834.

JACOBS against PHILLIPS.

The trial of a cause was postponed by order of a court of nisi prius, on the defendant's application, on the terms of his paying the plaintiff his costs of the day. The order of nisi prius was made a rule of court, and the costs were taxed, after which the defendant became bankrupt. Held, that he was discharged by his certificate as to these interlocutory costs so ascertained before the bankruptcy. A certificated not be discharged from arrest for a debt covered by his certifibeen inrolled pursuant to 6 G. 4. c. 16. s. 96.

RULE had been obtained by Follett for dis-'charging a certificated bankrupt out of custody, on an attachment for non-payment of costs. 'The following appeared on the affidavits:-This action (case for an excessive distress) had been called on for trial at the Guildhall sittings on the 23 December last, when, in consequence of the absence of a necessary witness on behalf of the said defendant, the trial was, by order of nisi prius, postponed till Hilary term, on payment of the costs of the day by the defendant. Those costs were shortly afterwards taxed at the sum of 1311. 9s., upon an affidavit of the plaintiff and a clerk of the plaintiff's attorney, that fifteen witnesses were subpænaed and in attendance on the part of the plaintiff. The order of nisi prius was made a rule of court in Hilary term, and, by an order of a baron, made on application of the plaintiff on 28 January, the trial was postponed until the costs of the day should be paid by the defendant, pursuant to the rule of court.

A certificated bankrupt cannot be discharged from arrest for a debt covered by his certificate, till it has been inrolled pursuant to 6 G. 4. c. 16. s. 96.

On 24 January a fiat in bankruptcy was issued against the said defendant, under which he was declared a bankrupt. The defendant was taken into custody on or about the 21 April, upon and by virtue of an attachment issued out of this court for non-payment of the said sum of 131l. 9s.; a previous demand thereof having been made from him. The defendant had obtained his certificate duly granted to him under the said fiat, bearing date 22 April, and confirmed by the Court of Review in bankruptcy on 17 May. The usual summons having been taken out for the discharge of the bankrupt, Baron Gurney declined to

IN THE FOURTH YEAR OF WILLIAM IV.

ake an order, giving leave to the defendant to apply the court.

JACOBS v. PHILLIPS.

Hutchinson showed cause. First, as it does not apear that the certificate is inrolled of record according 6 G. 4. c. 16. s. 96., the plaintiff has no knowledge of sexistence.

Follett contrà. By sect. 121 and 126 the bankrupt entitled to his discharge on the certificate being signed and allowed." The arrest may take place numediately after the allowance, and before involment rould be possible. The allowance is here sworn to.

Lord Lyndhurst C. B.—By 6 G. 4. c. 16. s. 126., a cases where a bankrupt is taken in execution or etained in prison on a judgment obtained before allownce of his certificate, a judge may order his disharge, on the producing his certificate (a). It does not appear to me that the defendant is in a different ituation from that in which he would be called on to roduce his certificate. Now we could not read it, if troduced, till it had been inrolled; and the affidavits re only a substitute for that necessary production. Enlarge the rule till the document is inrolled. If our lecision is in favour of the defendant, he will be entiled to his discharge immediately on the inrolment aking place.

It being agreed to argue the main point in the interim.

Hutchinson proceeded to show cause. By sect. 121 a bankrupt is only discharged by his certificate from

⁽a) Sec Novers v. Colman, Buck, 5; Baker's case, Stra. 1152; Ex parte Parker, 3 Ves. 534.



all debts due by him when he became bankrupt, and from "all claims or demands made by this act provable under the commission." Sect. 126 is to the same effect. The right of the creditor to prove, and of the bankrupt to be discharged under the commission, are co-extensive(a). Is it a "claim or demand" made provable under his commission by 6 G. 4. c. 16.? There are no words in that act like those in 7 G.4. c. 57. s. 60., and by which an insolvent debtor is relieved from imprisonment for costs with respect to which he shall have become entitled to the benefit of the act (b). Discharges of bankrupts are governed by sect. 121; now the words in that section "claims and demands," refer to such claims and demands only as might ultimately have become debts, e.g. bonds &c. payable at a future day, and annuities, the value of which can be ascertained, though only payable at future times.

Then, can these costs be said to be a debt within sect. 121. "due by the defendant when he became bankrupt," for which an action could have been maintained against him, or on which a fiat could have issued against him? It is not such a debt, unless a fiat could have issued on it against him. Several cases establish that no action can be maintained on an order of court for payment of costs on an interlocutory proceeding; Emerson v. Lashley(c), Fry v. Malcolm(d). So no action will lie for interest and costs payable by a decree of a court of equity; Carpenter v. Thornton(e). Ex parte Stevenson(f) goes further, and decides that taxed costs on a judgment as in case of a nonsuit, under a rule of court, do not constitute

⁽a) Per Lord Hardwicke, 1 Atk. 119; 1 Deacon's Bank. Law, 596.

⁽b) See sect. 50. (c) 2 H. Bla. 251. (d) 4 Taunt. 705.

⁽e) 3 Bar. & Ald. 52.

⁽f) 1 Mont. & M'Arthur, 262, Shadwell V. C.

petitioning creditor's debt, such costs being recoverde only by attachment in the nature of an execution. nt it will be argued, that the order in this case s founded on an agreement between the parties (a). n agreement is a compact, an accord of the parties; bereas the plaintiff made every objection in his wer to the postponement of the cause. That event. ok place against his will, and to his injury. Nor ses the order of the court amount to more than inmanifying him for his costs incurred in fruitless atndance on that day. This subsequent attempt to morce the order by attachment will not be said to mount to an agreement. How could it be declared as such? In Riley v. Byrne (b), the defendant agreed, on good consideration, viz. the compromise an action against him for libel, to pay what should, found due for the plaintiff's costs. The master's >catur operated as an award, and the amount might been proved under the commission. That decin turned on the agreement made in pursuance of compromise. In Rex v. Edwards (c) the attach-Bt issued for a debt from the defendant to his emyer Long, existing before the bankruptcy. So in parte Eicke, in re Harper (d), there were two we due before the bankruptcy, to which the costs overed attached themselves. [Alderson B. Had ase occurred now, it would have fallen within express words of 6 G.4. c. 16. s. 58.] Ex paris (e), in which Lord Chancellor Eldon reviewed all previous cases, also shows, that the principle on

JACOBS v.
PHILLIPS.

a) In Smith v. Whalley, 2 Bos. & Pul. 482, it was held that sassupposited lie on an agreement between the parties to a suit in Chancery to a solicitor's bill, which had been made a rule of that court.

b) 2 Barn. & Adol. 779.

c) 9 Barn. & Cress. 652.

d) 1 Glyn & Jam. 261.

⁽e) 11 Ves. 646.

JACOBS
v.
PHILLIPS.

which the courts have acted is, that the costs, being menely accessorial to the debt, are so incorporated with a motito be separable therefrom by the bankrupt's discharge from it, so as to make him liable for them latter that exent. Here the cause is still pending; whereas in those cases the costs were incurred in prosecuting claims barred by certificates. In no case has a bankrupt been discharged under his certificate from payment of costs, unless they were consolidated with, enaccessorial to some debt or claim proved or provable under his commission.

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. de Follett contrà. There is no necessity to decide that this is such an agreement as would support an action. Italis largued that a bankrupt's certificate has not efficacy to discharge him, unless in the case of a debt on which an action could be maintained; but many claims, which could not be enforced at law as debts, may be proved under his commission, and barred by his certificate(a). The rule is, that if there be any demand ascersained or completed before the bankruptcy, which the bankrupt might have been compelled to pay, he is discharged from it by his certificate, whether the remedy against him was at law or in equity, or only by attachment in either jurisdiction. Now in this case the taxaition of costs and allocatur were before the bankruptcy. There, is a plain distinction between such a debt as would be sufficient to support a commission, and a debt, claim or demand, which by the bankrupt laws might be proved under it, and would be barred by a certificate: for though the first must be a legal debt, many demands of a different nature might be proved under a commission. That is the ground taken by Mr. Abbott in argument, and acted on by the court in Ex parte

657

Charles (a), where it was held that damages recovered against a defendant, who between verdict and judgment committed an act of bankruptcy, did not form a good petitioning creditor's debt, whereon to found a commission. The present Lord Henley, in his Bankrupt Law(b), says, "The petitioning oreditor's debt must be a debt at law. Therefore the assignee of a bond cannot be a petitioning creditor." For the same reason one partner cannot sue out a commission against another on any debt arising out of a partnership transaction(c). In Gregory v. Hurrill(d), the question was, whether a debt, barred by the statute of limitations at the time of issuing the commission, was such a debt as would support it. Continuances had, after the issuing the commission, been entered on the roll, in an action commenced against the bankrupt more than six years before. The debt was provable under the commission, and barred by the certificate, and the court of Common Pleas, on a case sent for their opinion by Lord Eldon, held, that it would be a good petitioning creditor's debt. The Lord Chancellor, being satisfied with that opinion, sent another case to the court of King's Bench, who held that it was not such a debt as would support the commission, and the cause was afterwards decided according to that opinion. proof may take place in respect of legacies, assessed taxes, church and highway rates (e), though no action would lie for them.

⁽a) 14 East, 210. relied on in Walker v. Barnes, 1 Marsh, 346; 5 Taunt. 778, S. C.; and see since 6 Geo. 4. c. 16. s. 56; in Biré v. Moreau, 4'Bing. 57; Atwood v. Partridge, id. 209; Boorman v. Nash, 9 B. & C. 145.

⁽b) 3d edit. p. 42.

⁽c) Deacon's Bankrupt Law, Vol. I. 88.

⁽d) 3 Brod. & Bing. 212; S. C. 1 Bing. S24; and finally, 5 B. & C. 341; see also Taylor v. Hipkins and ---- v. Gregory, 5 B. & Ald. 489.

⁽e) Henley's Bankrupt Law, 3d ed. 102; 1 Deacon, 223. 301.

JACOBS V.
PRILLIPS.

The test then, whether a bankrupt is discharged by his certificate as to a particular demand, is not whether an action could be supported for it, but whether its amount is liquidated and ascertained before the bankruptcy. For if it is, and could then be enforced in any manner whatever, there is no case which impugns the position that it is provable, and that the certificate operates as a discharge. The policy of the bankrupt laws is to free the bankrupt from all his liabilities, after he has given up all his property. In every case, where a bankrupt's certificate has been held not to discharge him from payment of costs, the judgment has not been signed or costs taxed before the bankruptcy (a). in cases of damages recovered in actions of tort, the question has been, whether the verdict was obtained before or after the act of bankruptcy; and though Ex parte Charles shows that damages recovered in tort do not form a good petitioning creditor's debt, if an act of bankraptcy intervene before judgment signed, it does not show that they might not be proved under the commission, or be barred by the certificate. In Ex parte Hill(b) the verdict as well as the judgment was after the act of bankruptcy; and Lord Eldon decided, that, whether they were obtained for an antecedent debt by contract(c), or for mere damages in tort, the costs could not be proved as a debt under the commission. That was so held, because the costs were not liquidated or ascertained at the time of the bankruptcy, so as to be provable under the commission (d). [Lord Lyndhurst C. B. Without question costs are barred by a certificate, when connected with a provable demand;

⁽a) See cases cited, ante, 657, n. (a); and Wyborne v. Ross, 2 Taunt. 68; 1 Rose B. C. 112 S. C.

⁽b) 11 Ves. 646.

⁽c) Willett v. Pringle, 2 New R. 196.

⁽d) See Es parts Todd, cor. Lord Keeper Henley, as stated 11 Ves. 648, 652.

for instance, where the cause of action is in contract. and the verdict has been obtained before, but the costs are not taxed or judgment signed till after the bankruptcy(a). This is a case of interlocutory costs. It is here submitted for the bankrupt, that where the amount of a pecuniary claim is ascertained before the bankruptcy, it is barred by the certificate, whatever may be the means of enforcing it. The cases of discheving a subpœna, or any matter of a criminal nature, would be different (b). Nor is the argument affected by the cases which decide that an action will not lie on an order at law for costs, or on a decree to the same effect in equity. It has been attempted to argue, from Corpenter v. Thornton(c), that because a specific sum, awarded to a party by a decree of a court of equity, upon equitable considerations only, could not be recovered at law, it was not provable under a commission against the defendant; but equitable debts and demands are constantly proved, and in that case the demand being of a sum ascertained before the bankruptcy, was clearly provable. Again, though partners have not in general a remedy against each other at law, yet if one files a bill against another, and has a decree against him for a sum of money, though no action would lie against him to recover it, it is clearly provable under his commission. In cases of bankruptcy, of a collection of taxes, &c., though the inhabitants would be bound to pay the taxes again, no action would lie by them. [Alderson B. In such cases there was generally a remedy against the party's goods, which are made re-

JACOBS ON PRINCIPS.

⁽a) See 1 Deacon's Bankrupt Law, 277; Ex parte Haynes and Poucher, 1 Glyn & J. 107. 385; Beeston v. White, 7 Price, 209; Jameson v. Campbell, 1 B. & Ald. 250; S. C. in Error, 1 Bing. 320; Dimedale v. Eames, 2 Brod. & B. 8.

⁽b) See Rex v. Davis, 9 East, 318; and see 1 Deacon, 623.

⁽c) 3 B. & Ald. 52.

JACOBS
v.
PHILLIPS.

sponsible in the first instance. Is there any instance where the remedy is only against his person, in which the demand has been proved and the party discharged?] In Carnenter v. Thornton no remedy could exist against the goods. So in all equitable demands, which are clearly provable, though the only remedy in equity is in personam. Besides, a bankrupt may in several cases be entitled to be discharged under the certificate, from and emand, not, provable under the commission. Rer

Light Keeper Henley's decision, as stated by Lord Eldon in Exposte Todd(b), was, that after nonsuit in ejectment, before a bankruptcy, the nonsuit was nothing, and there, was no demand at law by the defendant for costs till judgment, which, being after the bankruptcy, there was not a debt at the date of the commission, and the gosts of the nonsuit could not be proved. That

les nascintained (a) 5 M. & S. 508. It is added in Lord Henley's Bankrupt Law, 3d ed. 1111 1111 111. 413. that it may be inferred, as well from the judgments of Lord Eldon in Et purite Hall, 11 Ves. 646; and Sir John Leach in Exparte Haynes and Printer, 1 Glyn & J. 386. as from several other decisions there cited, viz. Scall and Ambress 13 M. S. S. 326; Dimedale v. Eames, 2 Br. & B. 8; Holding v. Impey 1 Bing. 189; Exparte Haynes, 1 Gl. & J. 107; Blandford v. Foote, Cowp. 138; on the point that the costs of all proceedings in an action on contract, Walth, for want of a previous verdict, are not provable under the commission topp yet barred by tile estiticate, together with the original debt. The learned author, however, ados, that the cases last cited cannot be reconciled with Walker v. Barnes, 1 Marsh, 346; 5 Taunt. 778; and Haswell v. Thorogood, 7 B. & C. 705. In Exparte Haynes and Poucher, 1 Glyn and J. 3661 the Ville Chancellor (Eesch) states, as the result of the authorities, that quitability between verdict and judgment, in an action on contract, the costs do incremento are provable, being by the verdict incorporated with the existing debt, though not ascertained in amount until the judgment: distinguishing, (says the editor of the 2d edition of Vescy's Reports, 11th vol. 652,) in that respect the case of a verdict in tort, and adopting Lord Eldon's conclusion, that even in contract, if the verdict be after the bankraptcy, the costs are mot provable; but inclining strongly to the opinion that they are in that case barred by the certificate, together with the original debt.

(b) 11 Ves. 651.

ned on their amount not being ascertained before bankruptcy, and was acted on in Ex parte Hill. alland B. In Haswell v. Thorowgood (a) a cause and matters in difference were referred at his with to arbitrator, who found a sum of money to be due m the plaintiff, the bankrupt; to the deschard, and lered it to be paid to the defendant accordingly. e bankruptcy happened before the costs were taxed, judgment of nonsuit signed; and it was held that the ed costs could not be proved under the commission. I that the bankrupt was not discharged as toothat ot by his certificate. There, the costs were not comtely ascertained by taxation until after the bank-Here, as the costs were taxed before the skruptcy, neither that case nor sect. 58 of 6 6.4. 16. (b) apply. In Ex parte Eicke (c) the bankrupt s held discharged from costs taxed before the bank! otcy, though no action could have been maintained Nor is Ex parte Stevenson (d) an authority ainst the discharge of this bankrupt, for it is admitted it, in order to support a commission, a petitioning ditor's debt must be a legal debt. Lyndhurst B. The allocatur seems to have ascertained the count of costs in this case. The question is of very eat importance, and we will consider it.] On another y judgment was delivered as follows:— " and this borned

JACOBS v.
PHILLIPS.

Lord Lyndhurst C. B.—We have considered this sestion, and are all of opinion that the bankrupt is titled to his discharge. We have come to this consider, not at all on the ground that there was an reement between the parties. Taking all the cirmstances into consideration, we think that no such reement existed; but we think that there was an

⁽a) 7 B. & Cr. 705.

⁽c) 1 Glyn & J. 261.

⁽b) First made law by 6 Geo. 4. c. 16.

⁽d) 1 Mont. & M. 262.

1834. Jacobs PRILLIPS. ascertained " claim or demand" before the bankruptcy, from which the bankrupt was discharged by his certificate. The consequence is, that this rule for discharging him out of custody must be made absolute.

Rule absolute on inrolling the certificate(a).

(a) In James v. Sowell and Cook, K. B. May S, 1825, L. J. 167. (before 6 Geo. 4. c. 16. came into operation) a record had been withdrawn on the terms of the plaintiff's paying the defendant his costs, as between attorney and client. They were taxed accordingly, but not paid as agreed on. A commission of bankrupt then issued against the plaintiff, and a judgment as in case of a nonsuit was afterwards obtained against him, the costs of which were taxed as between party and party, and the plaintiff was taken in excution for both sums. On motion to discharge him out of custody as to the costs first taxed, the court held, that they did not constitute a debt provable under the commission, and that the agreement between the plaintiff and defendant having been broken, the proper course had been adopted to obtain the costs. Rule absolute on payment by the plaintiff of such sum as should appear to be due on re-taxation as between party and party.

BATE against KINSEY.

The assignee of a reversion sued the assignee of a term for rent. The plaintiff's attorney was called for his the execution of the deed of assignment of the reversion

EBT by the assignee of the reversion against the assignee of the term, to recover half-a-year's rent due 25 March 1833. The first count was on a demise by deed, dated 24 March 1826, by Robert Rowland of the one part, to Ellen Kinsey of the other part, for 21 client to prove years, and stated the reversion to have been assigned by Rowland by lease and release, dated the 5 and 6 October 1832. The second on a demise generally, and the third for use and occupation. Plea: nil debet. cross-examination, no objection being made as to his privilege, he deposed that there had been a subsequent deed between the same parties relating to the demised premises. He also said that he had it in court, but objected to produce it on the ground of his privilege. No notice to produce it had been given. The defendant contended that he was entitled to give secondary evidence of the contents of the deed, but did not state the nature or effect of the proposed evidence: Held, that such evidence was not admissible.

BATE 9.

the trial before Bolland B. at the last Cheshire ises, the counsel for the plaintiff rested his claim on count for use and occupation. He first proved the under which Robert Rowland claimed the locus in , and then called the plaintiff's attorney, Mr. wper, to prove the deed of assignment to the plaintiff Rowland of the reversion, as stated in the first count. cross-examination, the witness stated that the title Rowland to assign being doubtful, it was arranged the time of executing the assignment, that the opin of a conveyancer should be taken on the point in stion, and if it should be in favour of Rowland's additional consideration money should be paid, l another conveyance executed to the plaintiff. ted that another conveyance was subsequently exeed in January 1833, and that he had it in court, but ected to produce it, saying, that as attorney to the intiff he could not be compelled to produce his titlead unless notice to produce it had been given.

Parol evidence of the contents was then offered for defendant, in order, as was said, to prove a variance the first count; but the learned baron rejected it, ing leave to move to enter a nonsuit; the plaintiff had erdict for the half year's rent sought to be recovered, hout the defendant's counsel addressing the jury.

A rule was obtained in *Easter* term, according to the ve reserved; however, on showing cause the court d there could be no ground for that rule, and ditted the argument to proceed as for a new trial, on ground of rejection of evidence admissible by law.

Evans and J. Jervis showed cause. Nothing more peared on the evidence of Harper than that there s a second deed relating to the demised premises, ted January 1833, and executed between these rties. Its nature, effect or contents did not appear.

BATE
v.
Kinsey.

The assignment of the October previous, which was proved, made out a complete title in the plaintiff, and it was not sought to show that the reversion was taken out of him. The court then called on

Lloyd and Welsby to support the rule. The fact of the existence of a second conveyance appeared on cross-examination as to the consideration of the first. It also then appeared that that second conveyance was in court, and the refusal to produce it, on the ground of its being one of the plaintiff's title-deeds, made secondary evidence of it inadmissible. [Lord Lyndhurst C. B. The plaintiff's attorney could not be asked as to the contents of his client's deed, for he had no right to give evidence upon the subject. Had the defendant any witnesses of his own in court to prove those contents? Alderson B. If no witness was tendered by you, no real question could be raised.] It does not appear necessary that on a question of the admissibility of proposed evidence tendered, its particular nature should be stated. No such question was asked as to the parol evidence offered in Edwards v. Buchanan (a). [Lord Lyndhurst C. B. I am not satisfied that there was evidence that the second deed related to the demised premises. The plaintiff's attorney put in a deed which established the plaintiff's title. He then admitted he had in court another deed belonging to the plaintiff relating to the same property; but how could that appear? The plaintiff was not bound to produce that deed. Secondary evidence of its contents was therefore admissible, though no notice to produce it was proved. Roc v. Harvey(b) applies, where Lord Mans-

⁽a). 3 Bat. & Adol. 788.

⁽a) 4 Burr. 2484; Yates J. differed from Lord Manufield and the rest of the court, saying, that the fact of the conveyance coming out on cross-examination could make no difference, the plaintiff's counsel were not

eld principally laid stress on the plaintiff's refusal to roduce a conveyance which was in court, and said, the

BATE v.
KINSEY.

sliged to produce the deed, for no man could be obliged to produce evidence gainst himself. The only consequence of a notice to produce would have ≥n, the admission of inferior evidence. And Willes J. said, " parol evidence ald not be given by the party who had the deed in his power and refused though it might by the adverse party. It is reasonable that if one party an possession of a deed, and refuses (after proper notice) to preduce it, the her side should be admitted to prove the contents by inferior evidence." Mr. Phillipps, after stating Roe v. Harvey in his Law of Evidence, (vol. i. \$7,6th edit.) says, "Upon this case it may be observed, that the fact of Inline (one of the lessors of the plaintiff) having conveyed away all her neverst to Urry, (Thomas Urry, another lessor of the plaintiff on a several denise,) seems to have been assumed as satisfactorily proved; but from the opinion of Mr. Justice Yates, which seems the better opinion, it may be collected that there was no legal proof of any conveyance of title out of Heldme, and that the answer of the witness, (viz. that Mrs. H. had, before the day of the demises in the ejectment, conveyed away her interest in the premises to Mr. Thomas Urry, i. s. the other lessor of the plaintiff, and that the deed was in court,) was as inadmissible in evidence on the cross-examiintion as it would have been on the examination in chief." He adds, "the true objection to such evidence is, that the witness was speaking to the contents of a deed, when there had been no notice given to produce the briginal; and it does not appear to be a sufficient answer to say that the deed in in court; for if the party had received a regular notice to produce it, he might come prepared with evidence to repel any inference which the production of the deed might have raised against him? with deed might have raised against him."

where the notice to produce having been served too late before the triple, it. was attempted to enforce the production of the required lease, by stating, the admission of the defendant's attorney that morning in the hall, that he hall with him. But Scarlett, for the defendant, objected, citing Exall v. Paraige, whose witness having admitted he had a louise his picket of land lease witness having admitted he had a louise his picket of land lease witness having admitted he had a louise his picket of land lease witness; and lord et all that it was impromented the other side to give no opportunity of the other side to give notice in time, in order to give an opportunity of the defendant not having received proper notice; and see had v. Hearn, Moody & Rob. 201; Bevan v. Water, M. & Malk. 1937. O'' in Mr. Starkie, in his work on Evidence, Vol. I. 2d edit. 350, n. after citing he v. Grey and Roe v. Harvey, observes on the latter, "It would probably we held that the evidence was sufficient, since it seems to be clear that a statement on cross-examination was not admissible in evidence to prove

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BATE v.
KINSEY.

want of notice was no objection, because they had the deed in court. There was parol evidence enough in the cause to show that the title was varied by the original deed. [Lord Lyndhurst C. B. If that evidence was properly received, it gave the defendant a right to address the jury on the presumption arising against the plaintiff from his withholding the deed, and if they thought that fact affected the plaintiff's case, they might have given the defendant a verdict. Mansfield says, in Roe v. Harvey, that in a civil case the refusal by parties after proper notice to produce evidence which may prove against themselves, will be left by a court as a strong presumption to the jury (a).] The learned baron having delivered his opinion on the evidence, it seemed most fit not to address the jury. It might, however, be assumed from the other facts, that the second deed altered the whole title. [Alderson B. In Roe v. Harvey there were several demises by Mrs. Haldane and Thomas Urry; the evidence proffered was a conveyance by the former to the latter, then it was reasonable that parol evidence should be admitted of that conveyance; the title was proved to be in Urry. Yet the court upheld a nonsuit, which in fact affirmed that there was title in neither. strange decision. Lord Lyndhurst C. B. All that can be taken at the utmost to be decided by Roe v. Harvey is, that the non-production of a deed by the owner or party in a cause when called on, is a subject of strong

a conveyance; and, consequently, that the title under the will remained undistarbed."

⁽a) But if a witness declines to answer a question, the answer to which in the affirmative would tend to expose him to prosecution, no inference can be made that the witness admits the facts inquired into, Rose v. Blakemore, Moody & M. 384; and see the opinions of Holroyd J. in Rax v. Watson, 2 Stark. N. P. C. 158; Lord Eldon in Lloyd v. Passingham, 16 Ves. 64, all eited in the reporter's note there, which adduces reasons to the contrary.

BATE v.
Kinsey.

remark to a jury.] Mr. Phillipps, in his Law of Evidence, doubts the authority of that case, not on the ground put by Yates J. who dissented, but on the mere ground that no notice to produce was there shown (a). However, the objection here is, that the witness proved the title to be in the plaintiff in a manner not stated in the declaration. [Gurney B. In Cook v. Hearn (b), Mr. Justice Patteson held, that the attorney for the defendant could not be asked by the plaintiff's counsel whether he had with him a rule for payment of money into court, no timely notice to produce having been given, and that decision was assented to in banc in King's Bench on a rule nisi to enter a nonsuit.] That case does not apply, for that rule, to have effect, must have been served on the party calling for its production, and either party might have produced it. Here the defendant claims no interest under the deed in question. In Bevan v. Waters (c), the defendant's attorney was called on to produce a letter in his possession, the notice to produce having been served 100 miles from London the day before the trial. On objection that the question broke in on the rule against disclosing privileged communications, Best .C. J. said he recollected Lord Mansfield had decided that an attorney was bound to answer the question, the object being to let in secondary evidence in case it was not produced. He therefore thought the question ought to be answered. In Cocks v. Nash (d), the defendant wished to give in evidence a deed executed by the plaintiff and various of his creditors, but not by the defendant himself. One Hammond, named in the deed as a cotrustee with the plaintiff, had it in court, and was willing to produce it, but the plaintiff's counsel ob-

⁽a) See ante, note in p. 665.

⁽b) Moo. & Roh. C. N. P. 201.

⁽c) Moo. & Malk. 236.

⁽d) 6 C. & P. 154, S. C. not S. P. 9 Bing. 341. 723.

BATE v.
KINSEY.

jected, and Gurney B. admitted secondary evidence. Gurney B. A notice to produce was then proved before I suffered the parol evidence to be given. The trustee had suffered the defendant's attorney to examine a copy with the deed while in his possession; that copy was the secondary evidence admitted, but its correctness was proved not by Hammond but the attorney.] At all events if Harper, as attorney for the plaintiff, need not have answered the questions which he did concerning the contents of the deed, had he objected to them on the ground of his privilege, or if secondary evidence could not be given of them for want of a notice to produce; still as it appeared from his evidence that there was a second conveyance of the demised premises to the plaintiff in a manner varying from that laid in the declaration, Roe v. Harvey is sufficient authority to show that the plaintiff's title, manifestly imperfect, should have been cleared up by producing The only objection made at the trial the second deed. as to privilege was, that the plaintiff's attorney was not bound to produce the second deed; but he admitted his knowledge of the contents.

Lord Lyndhurst C. B.—I am of opinion that there ought not to be a new trial in this case. The effect of the evidence, as it now stands, is, that it appeared from the plaintiff's witness, who was his attorney, that in January 1833, some other deed relating to the demised premises had been executed to the plaintiff by the same party who had previously executed the assignment of October 1832; but nothing more appears respecting the contents of the second deed; and it is quite consistent with all the proof that the second conveyance might have been a confirmation of the former. But it was contended, first, that as the second deed was in court in the possession of the plaintiff's attorney

it ought to be produced; and, secondly, that if he refused to produce it, parol evidence of its contents was admissible. But it does not appear what that other evidence which was proposed to be given by the defendant was, or that he was prepared to offer any, oral or written, as a part of his own case. Then it seems that he was reduced to giving such evidence as could be attempted to be extracted from the plaintiff's attorney. Now it is clear that such a witness could not be called on or permitted to give parol evidence of a deed material to his client's title, even if willing to do so (a).

BATE v.
Kinsey.

BOLLAND B. concurred.

ALDERSON B.—Suppose it to have been necessary to plead specially the facts now relied on by defendant, it must have been alleged that another deed between the same parties, relating to the same premises, and of a subsequent date, had been executed. But could that, without giving any further description of its contents, have afforded any answer? Then if it would be no defence on the record, it could be none if given in evidence without more at nisi prius. It is quite clear that the attorney could not be called on to state the contents of his client's title-deed. I have already stated my sentiments as to Roe v. Harrey.

Gurney B.—I am of opinion that very dangerous consequences would ensue if it were held that secondary evidence might be given under these circumstances. A notice to produce the deed was equally necessary, whether it was in court or not. The contents of the deed were not here in evidence, for Mr. Harper could

⁽a) See 1 Stark. on Evidence, 2d edit. p. 70.

BATE U. KINSEY.

not prove them, whereas in Ros v. Harvey the witness proved that the deed there relied on was an assignment.

Rule discharged.

See Marston v. Downes, 6 C. & P. 381, as to proof of contents of mortgage deed in possession of mortgagee.

NEALE against MACKENZIE.

statute made before 3 and 4 Will. 4. c. 42. a defendant had a right to give special matter in evidence under the general issue, that right is reserved to him by section 1. of the lastmentioned act; but since Reg. Gen. Hil. 4 Will. 4., he cannot plead the general issue, and also a special plea of justification.

Where by any statute made before 3 and 4 tiff's dwelling-house, and seizing and detaining his will. 4. c. 42. goods.

A rule had been obtained to plead several matters, viz., not guilty, and a justification for entering the house as landlord to scize the goods on a distress for rent in arrear (a).

Comyn showed cause. By 11 Geo. 2. c. 19. s. 21., the defendant being the plaintiff's landlord and now sued for entry on the premises charged with the rent, could give every special matter in evidence under the general issue. That power is reserved entire by 3 and 4 Will. 4. c. 42. s. 1. Again, by the new Reg. Gen. Hil. 4 Will. 4. No. 5. [p. viii. ix. and x. in this Vol.] pleas founded on one and the same principal matter, but varied in statement, description or circumstances only, are not to be allowed. Then both pleas cannot be pleaded. [Alderson B. He may give more than the special matter in evidence, so the word only is not satisfied. Lord Lyndhurst C. B. As the plea of not guilty comprehends more than the special plea, the

(a) The general importance of this application since the new rules had induced Gurney B. to refuse to make any order on summons before him.

lefendant may have some other matter of defence under the former which is not covered by the latter.]

1834. Neale v. Mackenzie

Cleasby in support of the rule. The defendant eeks to plead specially, in order to put the plaintiff to raverse facts stated in the plea. Before the new rules e might by the general issue deny the trespasses and astify them by a special plea. [Lord Lyndhurst C. B. Inly by leave of the court to plead several matters.] The defendant is not compelled to plead the general issue eserved to him by the statute, but here seeks to use it to certain extent only, e. g. to deny the trespass &c., and Il matters except those which he proposes to justify by is special plea, e. g. entry to demand rent, or for the urpose of distraining. Nothing in the new rules has ltered this defendant's former right to narrow his roof by special pleading. The very object of the new ules is to bring to the notice of the parties before trial he disputed facts material to the merits of the case, ut if he is confined to the general issue he must go to rial prepared to prove every thing.

Lord Lyndhurst C. B.—The defendant must make is election. If he pleads the general issue not guilty eserved him by the statute, he must take it with all its dvantages and inconveniences. This inconvenience rises from the act 3 and 4 Will. 4. c. 42. s. 1., by which the judges were restrained from extending the sew rules to be made under the authority of that act to ases in which the right of pleading the general issue ad giving the special matter in evidence had been issen to defendants by statute. Nor before the new ules was the defendant entitled to plead double in the namer stated, as of course; for the leave of the court ras necessary under 4 and 5 Ann. c. 16., and they night limit the defendant to one plea.

1834. NEALE v. MACKENZIE. ALDERSON B.—This defendant has a right to plead the general issue and to give special matter in evidence, notwithstanding the new rules; but the court will not give him leave to plead several matters. He must plead them specially.

Rule discharged without costs, the defendant to elect his plea within 24 hours (a).

(a) The defendant afterwards pleaded not guilty as to the force and arms and whatever was against the peace, and specially to the rest. This was the course adopted in the old pleadings before 4 Ann. c. 16., Graene v. Jones, 1 Saund. 296; and has since prevailed when leave to plead double could not be obtained, e.g. in courts not of record, as county courts, and when it was sought to prevent the plaintiff from replying at the trial by throwing no necessity of proof on him in the first instance, so as to give the defendant the right to begin; for being originally only pleaded to save the fine to the king, (per Bayley J. and Wood B., Jackson v. Hasketh, 2 Stark. N. P. C. 518.) it was held not to be a general issue throwing the necessity of any proof on the plaintiff. Per Bayley J. Hodges v. Holder, 3 Camp. 366.

As to the right to begin, the judges have resolved that the plaintiff shall begin in all actions for personal injuries, and also in slander and libel, notwithstanding the general issue may not be pleaded, and the affirmative be on the defendant, per Tindal C. J. in Carter v. Jones, 6 C. & P. 64. tried in C. P. 6 July 1853. Burrell v. Nicholson, K. B. December 9th, 1833; 6 C. & P. 124. was trespass, with a first count for breaking into plaintiff's house, and taking and detaining his goods, and a second for taking the goods. Plea: a justification stating plaintiff's house to be within and parcel of the parish of St. M., and justifying the "taking the goods" as a distress for poorrates assessed on plaintiff in respect of his house as being in the parish of St. M. Replication: that the house was not within &c. St. M. The plaintiff claimed to begin, stating the action to be for taking the plaintiff's goods, but that as defendant was a constable, plaintiff must prove a demand of a copy of the warrant, whatever might be the issue to be tried. On defendant's admitting that demand, Denman C. J. held him entitled to begin, and the court of K. B. affirmed that decision in the next Hilary term.

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1834.

CLARKE and Wife against WEBB and Another.

A SSUMPSIT for use and occupation, with counts A landlord for money had and received, and on an account being in postated. Plea: general issue. At the trial before Lord premises lately Lyndhurst C. B., at the last Lent assizes for Surrey, solvent tenant, t appeared that one Lawrence being tenant of a house in which were of the plaintiffs, owed them 71. for a quarter's rent longing to the lue 25 March 1833, and filed his schedule in the in- latter, agreed to give up pospolvent court in June. On the 18th the plaintiffs dis-session on his rained for that quarter's rent on all Lawrence's fix- ing 7l. for the tures and a part of his furniture, and he was disthen rent due. charged in July, having procured it to be paid. lefendants having been appointed his assignees, afterwards removed some fixtures of his from the premises by them and sold them (a). No occupation by the assignees appeared, but it was shown that they had promised to pay 7L could not the plaintiffs the quarter's rent due from the insolvent on 24 June 1833, in order to get possession before sell- on an account ing the fixtures. The jury found a verdict for the fendants'agreeplaintiffs, damages 71.; thus affirming the agreement, subject to leave to move to enter a nonsuit.

Thesiger obtained a rule accordingly, on the ground vious transthat there was no count on which the plaintiff could tween the recover on the evidence given, Naish v. Tatlock (b).

Platt showed cause. It is not necessary to declare specially on an agreement not under seal stipulating for pecuniary recompence, and which has been perer miller den biser off by

(a) Where the lessee may himself remove fintures, they may be taken under a fi. fa. against him. Per Lord Lyndherst C. Bi, in Trappes ve Harter, ente, Vol. III. 619. Per Bayley J., Place v. Fagg, 4 Mann. & R. 277; Winn v. Ingilby, 5 B. & Ald. 625; Pitt v. Shew, 4 B. & Ald. 206; Evans v. Roberts, 5 B. & Cr. 841v

(b) 2 H. Bla. 319.

held by his infixtures beassignees pay-They entered The and sold the fixtures, but no occupation was proved. Held, that the be recovered on the count stated, the dement to pay that sum not being bottomed on any preactions beparties.

CLARKE and Wife
v.
WEBB and Another.

formed by the plaintiff, and indebitatus assumpsit lies on the defendant's obligation to pay a specific sum arising out of the performance of the special contract. The second quarter's rent had become due and the subsequent agreement was to pay it, so that the money was due, and might be recovered under the account stated, without proving use and occupation under 11 G.2.c. 19.

Lord Lyndhurst C. B.—No use and occupation by the defendants was proved. The agreement was this; the plaintiffs agreed to give up the key of the premises to the defendants, in consideration of which, they agreed to pay 71., the second quarter's rent, for which they were not liable. That was a distinct and separate contract by the defendants to pay a sum of money. Then how can that be converted into a claim available on a count for an account stated? That count implies some previous transaction between the parties with reference to which the account relied on was stated between them. The possession was given to the assignees, not with a view to their retaining it, but to get possession of the fixtures, which they accordingly got and converted.

The other barons concurred.

Rule absolute.

1834

Rush against Smyth.

RESPASS against the sheriff of Suffolk, for A witness seizing and leading away two horses of the plain- duce a docu-Plea: not guilty. The cause was tried before ment pursuant aghan B. at the Suffolk Lent assizes. The officer duces tecum, o had seized the goods under a fi. fa. was called for was sworn as plaintiff to produce the warrant under a subpoena mistake, and a ces tecum, and being so called, was by mistake sworn, question was asked him, but l asked by the plaintiff's counsel, were you employed he did not anbailiff, and had you any warrant? However, no this the wer was made. Storks Serjt., for defendant, claim- learned judge a right to cross-examine the witness as he had been suffer him to orn, but the learned baron refused to recognize that be cross-exaht, as the witness had not given any testimony. opposite party, was afterwards called for the defendant, but the who after-wards called dict was for the plaintiff.

A rule for a new trial having been obtained in that this ster term, on the ground that he should have been course having laid the whole mitted to cross-examine the witness.

Austin was to have showed cause, but the Court would not disled on

Storks and B. Andrews to support the rule. In had not been epson v. Smith(a), Mr. Justice Holroyd held that thus given in ritness, a magistrate, being merely called to pro- the witness, e an information in his possession, could not be having been ss-examined, though sworn, no question having asked a quesn asked him; but here the witness was sworn, and a tinent question was asked him. Though no reply swer, was s given, that could not affect the defendant's right to

(a) 1 Phill. on Evid. 260; 1 Stark. on Evid. 2d edit. 161.

called to proto a subpœna a witness by swer it. Upon refused to mined by the him as his own witness: Held, evidence before the jury, the court turb the verdict.

Quære, if the evidence chief, whether sworn and tion, without giving an anliable to crossexamination by the opposite party.

See the

eral rule, that he need not have been sworn as a witness, Summers v. Moseley, , 158.

RUSH v.
SMYTH.

cross-examine a witness produced by the plaintiff, whose silence in answer to the question propounded to him on the plaintiff's behalf was matter for the jury. Besides, in *Phillips v. Eamer and Another*, sheriff of *Middlesex(a)*, a witness having been put into the box and sworn, yet though he was not examined in chief, Lord *Kenyon* held, that having been called he should be examined. Then it is sufficient that the learned judge prevented the witness from being cross-examined.

ALDERSON B.—The objection was waived by the witness being called for the defence, so that as the whole evidence in the cause has been in fact laid before the jury, though not in the order contended for by the plaintiff's counsel, the verdict ought not to be disturbed. I do not say what I should have decided had the point arisen before me. The rule is now clearly settled in all the courts, that when a party calls a witness upon a subpœna duces tecum, to produce the documents required by that writ, which he produces or not at his peril; if he produces them, and they can be identified by other witnesses, without examining him, he is not open to cross-examination. a case which lately occurred before me at Carlisle, I ruled accordingly. The clerk of a public company was there called on his subpæna duces tecum to produce the books of the company. I held that he must produce them at the peril of attachment by the court who issued the writ. He then produced them, and they were identified by another witness, but I refused to suffer him to be cross-examined, and the Court of King's Bench refused a rule for a new trial. Here the witness was only called to produce the warrants.

⁽a) 1 Esp. N. P. C. 357; and see per Lord Hardwicke in Vaillent v. Dodemede, 2 Atk. 524.

GURNEY B.—A new trial, if granted, would only ake place under the same circumstances as the former, for it is not pretended that there is any other evidence to be laid before the jury, the witness having been examined.

1834. Rush 70. Smyth.

Rule discharged (a).

(a) See Summers v. Moseley, ante, 158, reported since this case was irgued.

COLBURN against PATMORE.

CASE. The declaration stated, that the defendant, The declarabefore and at the time of committing of the grievance defendant had by him the said defendant, as hereinafter mentioned, had been and was retained and employed by the said to edit the plaintiff to take upon himself the various duties of plaintiff's newspaper for editing a certain publication, to wit, a publication called reward, and The Court Journal, or Gazette of the Fashionable World, edit it in a prothen the entire property of the said plaintiff, and per manner, but without whereof he the said plaintiff was then and there the the knowledge, proprietor, and to devote all his time and attention leave, authoto the same, save and except the hours he had then of the plaintiff, already engaged to devote to the superintendance of falsely, mali-The County Press, and which hours were not to be negligently "inserted and increased beyond those then required on the Saturday published"

tion stated that been retained by the plaintiff that he did not rity, or consent therein a false

therein a false and malicious libel &c. It then proceeded to state that an information was afterwards exhibited against plaintiff for "falsely and maliciously printing and publishing" the said libel; and that such proceedings were thereupon had that plaintiff was convicted of the offence and fined 1004. The plaintiff had a perdict for the fine and costs. However, judgment was arrested, on the ground that upon the declaration the injury sought to be compensated did not appear necessarily consequent on the breach of duty charged against the defendant, for the act of printing and publishing by the plaintiff did not appear to be the same as that of inserting and publishing by the defendant. Semble: The proprietor of a newspaper in which, without his knowledge or consent, a libel is inserted by his editor, cannot recover against him the damages sustained by his own conviction as proprietor.

tained by his own conviction as proprietor.

Colburn v.
Patmore.

and Monday in each week, so that they should not interfere with the time and attention necessary to be given to the said Court Journal, and to undertake the literary management of the said Court Journal; and to prepare for the press all articles and matters belonging thereto, to the best of his ability and to the satisfaction of the said plaintiff; to write on the average one original article weekly; also the reviews and articles of fashion, music, literature, the drama, fine arts, digest of political events; to select from other journals all that might be found suitable for the pages of The Court Journal, and generally to contribute to the utmost of his power to the interest and success of the said journal, for reward to the defendant in that behalf. And it was stipulated that political controversy and party politics should form no part of the said journal, without the consent of the said plaintiff; and that the most perfect impartiality should be adopted in the literary and critical departments. And the defendant had then and there accepted such retainer and employment, and under and by virtue thereof, at the time of the committing of the grievance hereinafter next mentioned, had taken upon himself the various duties aforesaid, and then and there was the editor of the said publication called The Court Journal. Yet the said defendant, disregarding his duty in that behalf, and contriving and wilfully intending to injure and aggrieve the said plaintiff in this behalf, did not perform or discharge the various duties of editing the said publication called The Court Journal in a due and proper manner, but on the contrary thereof, heretofore, to wit, on the 28 day of Deswary 1832, in the county aforesaid, without the knowledge, leave, authority, or consent of the said plaintiff, falsely, maliciously, and negligently (a), in-

⁽a) Added to the declaration on summons to amend; see Tattersall's case, mentioned by Heath J. in Bush v. Steinman, 1 Bos. & Pul. 409; Rex v. Gutch and others, Moo. & Mal. 433.

Colburn v.
Patmore.

serted and published, and caused to be inserted and published in the said publication, called The Court Journal, the false, scandalous, malicious, libellous, and defamatory matter following of and concerning [here followed the libel on a lady of high rank], contrary to his duty as such editor as aforesaid, and to the duties which he had been retained to perform as aforesaid, and in breach and violation thereof. And the said plaintiff further saith, that an information was afterwards, to wit, in Easter term, in the second year of the reign of our said lord the king, filed in the court of our said lord the king, before the king himself, by E. H. Lushington esquire, coroner and attorney of our said lord the king, in the court of our said lord the king, before the king himself, who prosecuted for our said lord the king in that behalf against the said plaintiff; and one T. H., one T. S., and one Mr. T. for the falsely and maliciously printing and publishing of the said libel; and that such proceedings were thereupon had in the same court, that it was then and there considered and adjudged by the said court, that the said plaintiff should be convicted of the said offence, and that he should pay a fine to our said lord the king of 100% for that offence, and that he should be committed to the custody of the marshal of the marshalsea of the said court of our said lord the king, before the king himself, until he should have paid the said fine; by means and in consequence whereof the said plaintiff was then and there forced and obliged to pay, and did then and there pay the said fine, and also by means and in consequence of the premises, the said plaintiff was forced and obliged to pay and become liable to pay certain costs and expenses to a large amount, to wit, to the amount of 100% in and about his defence in the said prosecution, and in and about endeavouring to mitigate the senIN A STEEL TO STEEL T

tence of the max count upon how for the said offerefield the said planniff inviter saids that he was so prosecuted as almostic by remain and in consequence of the commutance of the said prevances by the said defendant as almostic, and that by remain and it consequence of the prevances for said plaintiff hash been otherwise greatly injuried and changed, to wis be. The second count was similar, without changing that plaintiff was prosecuted by remain of the committing the givenness by the defendant. First general inse-

Fulcit and faming showed came. The question s, viecler de remeieur af 1 revrouser, vis bevier been prosecuted by criminal information, for a likel inserved in it by his colour without his knowledge, is convicted and fased, one recover against him the expenses incurred by his missessurce! The plaintiff's ignorance of the culpable insertion is stated in the declaration, and was sever doubted, or this action could not have been maintained. [Merron B. Was not the plaintiff actually ignorant, but legally cognizant and linke! Proprietors of newspapers have been held liable for libels inserted by their servines to edit, though they were themselves resident at a distance, and confessedly ignorant of the act complained of at. These decinions do not proceed on any presumption of the moster's cognizance of the contents of their papers, for that might be rebutted by evidence to the contrary; but on the broad ground of public policy, that by holding masters liable for the acts of their servants, they may be driven to employ trustworthy persons. If it is said that this is not a negligent, but a wilful act of the servant, for which the master is not liable, those decisions apply to show the con-

Colburn v.
Patmore.

trary in the case of the proprietor of a newspaper. [Alderson B. That is because the law presumes he knows the fact. If that presumption arises, notwithstanding proof to the contrary, the result is the same. The law should presume him cognizant so as to enforce his remedy over against the person who exposed him to the consequences of that legal presumption. [Alderson B. If the law presumes a proprietor of a paper to be cognizant of the acts of his servants, and holds him liable accordingly in criminal proceedings, can he sue a co-trespasser for contribution?] rule by which such proprietors are so held liable is not founded on that presumption, for that would be open to rebutter by proving the fact of the master's igno-It rests on a different principle, vis. that in his capacity as such proprietor he takes on himself the task of preventing the insertion of libellous matter in his publication, under the penalty that if he does not, he shall be criminally responsible, whether cognizant of the offence or not. Then being actually ignorant of the act of his servant, though liable in law to pay for it as his own, he claims to recover from him the amount of loss occasioned him by it. It would be sufficient to prove that the defendant "negligently" caused the insertion of the libel (a); and it is a clear rule that where damage is occasioned to one man by the negligent act of another, an action on the case will lie for it. Chief Baron Comuns in his Digest, tit. Action on the Case (A); collects cases which show that no one can sustain injury from the wrongful act of another, without having a remedy over against him by action. Then, if a master who is civilly liable for the act of his servant! in negligently driving his carriage in his absence, can sue the latter for the pecuniary loss sustained by him in consequence of such his act, there is no reason why, because

(a) See Chitty on Pleading, 4th edit. 335.

Colburn v.
Patmore.

in this peculiar case the master is criminally as well as civilly responsible for the negligent act of his servant, he may not equally sue him for the expenses occasioned by a criminal prosecution for that act. There can be no difference between the loss incurred by the costs and fine in a criminal information and the damages and costs in an action. Can it be doubted, that had the civil remedy been taken against the plaintiff, the damages and costs might have been recovered by him in this mode against this defendant? [Lord Lyndhurst C. B. There is this distinction between the present case and others where the acts of servants render their masters liable; that even if a libel be published wilfully by the servant, the master is civilly as well as criminally amenable, though in other cases he is only liable for his negligent or unskilful act (a). It is an anomaly in this particular case. Alderson B. The difficulty is, that a master is presumed to authorize the publication of a libel by his servant, whereas in other cases of torts by a servant he is not.] Taking the master as amenable, whether the act be wilful or not, or known to him or not, and that he suffers damages in consequence, why, if he proves that he did not know it, is he not to maintain an action against his servant. as he would in a case where he does know it? [Alderson B. The proprietor of a paper is a master giving general authority to publish every thing; libellous or the contrary. Then is he not criminally responsible for giving that authority? Taking the presumption of law to be that the servant has a general authority to publish, still no authority from him to do the illegal act of publishing a libel can be presumed, it must be expressly proved; for an authority to publish a newspaper does not necessarily imply authority to publish libels in it. The hardship would be extreme if a pro-

⁽a) Macmanus v. Crickett, 1 East, 106, &c.

Colburn v. Patnore.

1834.

prietor of a paper should be held not only responsible for the criminal act of his servant, but also to have no remedy over against the party really guilty. It may be said, that if both master and servant were sued together jointly, neither could sue the other, being both tort-feazors; but the fact admitted on this record is, that the libel was inserted without the knowledge and consent of the plaintiff. Then the plaintiff is not a tort-feazor, and sues for indemnity not for contribution. The law may for its own objects regard them both as guilty, for the purposes of civil or criminal proceedings by parties injured, but not inter se, so as to prevent reparation to the innocent party from the party really guilty. In Adamson v. Jarvis (a) an auctioneer who had been employed to sell goods by a person who had no right to dispose of them, was sued alone by the real owner, who recovered the value against him. Thereupon, though the action of tort might have been joint against the employer and auctioneer, who were both tort-feazors in legal contemplation, it was held that the auctioneer having sustained the loss might recover against his principal. The reason why one tort-feazor cannot sue the other is, that both are equally guilty. [Alderson B. Alike guilty.] Now the plaintiff's guilt in any sense but that imposed ex necessitate by the law quoad alios, is here negatived. In the last case, Best C. J. says, "From the inclination of the court in Philips v. Biggs (b), and from the concluding part of Lord Kenyon's judgment in Merryweather v. Nixon(e), and from reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act. If a man buys the goods of another from a person who has no authority to sell

⁽a) 4 Bing. 66.

⁽b) Hardres, 164.

⁽c) 8 T. R. 186.

Colburn v.
Patmore.

them, he is a wrong-doer to the person whose goods he takes, yet he may recover compensation against the person who sold the goods to him. Suppose a master to be convicted in penalties under the smuggling or revenue laws, and penalties to be inflicted on him for the wrongful act of his servant, cannot he recover over against that servant? [Lord Lyndhurst C. B. The nearest case would be that of a master carrying on a business subject to the supervision of the excise laws, whose servant does some act to violate them without his knowledge, so as to subject him to penalties (a). When the relative situation of the parties is considered, it is not by any means conclusive against your argument that no instances of such actions can be produced (b).] In Humphrys v. Pratt (c), a sheriff trusting to a plaintiff's representation had seized cattle under a fi. fa. as belonging to defendant: damages being afterwards recovered by the real owner against the sheriff, he sued the original plaintiff in case to recover the damages and costs incurred in consequence of his misrepresentation, without averring fraud in the representation or knowledge of its falsehood, and obtained judgment in the Irish courts of Exchequer and Exchequer Chamber; which was affirmed on appeal to the House of Lords (d). In that case both the creditor and the sheriff were joint tort-feazors as against the owner of the cattle.

⁽⁴⁾ See Atterney-General v. Riddell, ante, Vol. IL 523.

⁽b) In Nixon v. Bronan, 10 Mod. 109, 4 Bac. Abr. 589, Gwill. ed., 6th edit., the court, after holding a master liable for a loss occasioned by his servant's disobedience of his orders, were of opinion that the master could not recover it of the servant, the loss being occasioned by a mere accident, and not by either folly or negligence. See also Langdon v. African Company, Prec. Chauc. 221. Trin. 1703; 15 Vin. 316.

⁽c) Dom. Proc. 5 Bligh's R. 154; 2 Dow & Clark, 218.

⁽d) Per Lords Tenterden and Wynford. The former afterwards said in K. B. that the decision turned on the sheriff being a public officer liable to an action if he refused to act.—Clark's MS.

real offender, and it is by an anomaly only that plaintiff is convicted of the offence. The plaintiff is not seek to recover contribution but indemnity, listinction taken by Lord Kenyon in Merryweather Nixon, where the plaintiff sued for contribution, adting himself to be equally guilty of the tort with defendant. Had the defendant agreed to indemy the plaintiff for all damages he might incur by the erting any libel in the paper, it might have been forced, or bonds to guarantee the good behaviour of rks or sheriffs' officers would be invalid instruments.

Colburn v.
Patmore.

Maule for the defendant. This is an action in which plaintiff seeks to exonerate himself from the conseences of a conviction for an offence. He assumes it it appears from the declaration, that he neither ew of or consented to the commission of the offence. at it is consistent with both the counts that he comtted the offence himself, and there is no averment at he did not. The declaration states, that the demdant "without the knowledge, leave, authority, or ment of the plaintiff, falsely, maliciously and neglintly inserted" the libel in The Court Journal, and that information was afterwards filed in the King's Bench minst the plaintiff, for "the falsely and maliciously inting and publishing of the said libel," and that the intiff was convicted "of the said offence." That ence is stated to have been the "falsely and maliciby printing and publishing the said libel," not the deadant's act of inserting the libel in The Court Journal. en what is there on this record to show, as has been gued, that the plaintiff was innocent in every sense cept that of the rigorous rule of law? Nothing identis the false and malicious publication of which the aintiff states himself to have been convicted, with the 1834.
COLETES
T.
PATHORE

" false, malicious and negligent publication" in The Court Journal, charged by him to have been done by the defendant. The two acts stated, of " inserting and publishing" by the defendant, and " printing and publishing" by the plaintiff, are perfectly distinct. Both parties may have singly published the same libel at different times, for it is not averred to be one act. Then the judgment of the court of King's Bench, set out in the declaration, that the plaintiff did falsely and malciously publish the libel, must be taken to be conclusively true, and not to be contradicted by averment. In point of fact, the averment of the plaintiff's innocence only extends to the act charged on the defendant in this declaration, not to that of which the plaintiff himself was convicted. [Lord Lyndhurst C. B. There is no averment that the plaintiff was ignorant of the libel being published. Then, consistently with this declaration, the libel might have been originally "inserted" by the defendant as editor, and afterwards sold by the plaintiff at his shop. Alderson B. It would come to the same thing as the sale of a book or paper by a party ignorant of its contents. Is there any precedent of a bookseller prosecuted for publishing a libel having sued the pub-There is, however, an averment which may tend to connect the act of the defendant with that of the plaintiff, viz. " that the plaintiff was so prosecuted as aforesaid, by reason and in consequence of the committing the grievances by the defendant as aforesaid" That publication of which the plaintiff has been convicted by a competent tribunal, may have taken place by him in consequence of the insertion by the defendant. No such averment appears in the second count.

The main question is, can a party convicted of a public wrong, for which criminal proceedings might be had, claim indemnity for the results to himself from another who has joined with him in committing it. The

Colburn v.
Patmore.

difficulty arises from the gratuitous assumption that the offence of publishing a libel in a newspaper, stands on a different footing from other acts to which the law has affixed the penalties of crime. [Lord Lyndhurst C. B. Suppose damages in a civil suit had been recovered against the plaintiff for publishing this libel.] The same defence would have been open. Whatever may be the nature of the particular act, held by law to be a crime, the same consequences must follow. Then, if by law a proprietor of a newspaper may be morally innocent, and yet criminally responsible, in point of law, for the publishing a libel in it, whether he knows of its insertion or not, he must be treated as an offender to all intents and purposes.

Lord Lyndhurst C. B.—The declaration shows, that the first act relating to the libel in question, was that done by the defendant, viz. the "inserting and publishing" it in The Court Journal. The charge of insertion would have been satisfied by proof of his putting the matter into writing, and handing it to the This act of the defendant appears from the declaration to have been followed up by this additional act of the plaintiff, viz. printing and publishing what had been thus previously prepared by the defendant. And it is quite consistent with the allegations on the record, that the latter act might be distinct from the former. The plaintiff may have chosen to adopt an article furnished him by the defendant. He has been convicted of maliciously publishing the libel, nor does any thing appear to show him not practically and in fact a participator in that transaction. The averment, that the defendant inserted and published the libel without the plaintiff's knowledge or consent, may be true, and yet the plaintiff may have been so pleased with it, as to have suffered it to be printed, or may have published it again on a subsequent occasion.



The important general question on the merits does not, therefore, arise. I am not aware of any case, in which a man duly convicted of an act declared by law to be criminal, and punished for it accordingly, has been suffered to maintain an action against the party who participated with him in the offence, in order to procure indemnity for the damages occasioned and sustained to him by that conviction. But after hearing the arguments, I entertain little or no doubt that such an action could not be maintained.

Bolland B.—I agree with the court in their decision. It has become unnecessary to decide upon the main question.

ALDERSON B.—The declaration states, first, a duty on the part of the defendant, and then a breach of it by him in not properly performing his duties of editor. It should then have gone on to show an injury sustained by the present plaintiff, in consequence of the defendant's breach of duty previously alleged. This he has not done, for the injury as laid appears to have been sustained from his own wilful and separate act, in printing and publishing the libel in his newspaper. Upon the general question I agree in the view taken of it by my lord chief baron.

GURNEY B.—The plaintiff cannot have judgment on this record. On the other question I strongly concur with the opinion already expressed.

Rule absolute for arresting the judgment (a).

(a) Where both parties are equally criminal against the general laws of public policy, the rule is potior est conditio defendentis: per Lord Mansfeld C. J. Smith v. Bromley, Dougl. 697; relied on by Lawrence J. in Housen v. Hancock, 8 T. R. 578; see Cowp. 343; 7 T. R. 535; 1 East, 96, 99.



1834.

Woodward against Cotton.

EBT on 5 Geo. 4. c. cxxv. s. 97. The first count By 5 Geo. 4. of the declaration stated, that the defendant did c. cxxv. (a local act,) nearrow a certain ditch situate &c., and not within no drain the limits of the jurisdiction of any commissioners of within a cerse wers, without the consent or approbation of the trus-described by tees mentioned in a certain act of parliament made in be arched the 5th year of his late majesty king Geo. 4., intituled, over by "any person what-"An act to repeal several acts for the relief and em-soever" withployment of the poor of the parish of St. Mary Isling- out the consent of certain ton, in the county of Middlesex, for lighting, watching, trustees. A and preventing nuisances and annoyances therein; for surveyor who was employed amending the road from Highgate through Maiden by a private Lane, and several other roads in the said parish" &c. superintend &c., in writing first had and obtained, contrary to the the erecting and arching form of the statute in such case made and provided, over of a drain whereby and by force of the statute the said defendant within that for his said offence forfeited the sum of 501., and district is a thereby and by force of the same statute an action hath "person" within the act. accrued &c.

Other counts varied the statement of the nature of the tion it was ditch or watercourse and the offence; one set alleging enacted, that it to have been committed contrary to the terms and be deemed stipulations, and in other manner than had been ex- and taken to be a public Pressed in a certain consent or approbation in writing act, and had and obtained by the defendant from the trustees should be judicially taken mentioned in the said act, in this, to wit, that the said notice of as consent and approbation so given and granted by the being specially said trustees expressed that the said last-mentioned pleaded: ditch to be arched over by the defendant was not to printed copy less than 13 feet superficial. Plea: nil debet.

The section in point enacted, "That it shall and may without proof be lawful for the said trustees from time to time, as they been examined

the act was to By the concluding sec-

such without was admissible in evidence that it had with the par-

liament roll, or printed by the king's printer.

Woodward v. Cotton.

shall see occasion, to widen, deepen, embank, turn, alter arch over, and cleanse and scour all and every and an of the watercourses, drains and ditches within the sak parish, and which are not under or within the limits of the jurisdiction of any commission of sewers, and to lay out new drains &c. through any lands, with the consen of the owners or occupiers, and assess the expenses upor the occupiers and owners of the premises which receive benefit or avoid damage by reason of the same. Pro vided always, that no ditch, drain, or other watercours shall be narrowed, filled up, altered, covered in or arched over, by any person or persons whatsoever, without the consent and approbation of the said trustees in writing being first had and obtained, nor in any other manner than is or shall be expressed in such consent; and in case any person shall so narrow, fill up, alter, cover in or arch over any such drain or watercourse whatsoever, within such part of the said parish, contrary to the intention hereof, he, she, or they shall for every such offence forfeit and pay the sum of 501,"

There was a clause that the act should be deemed and taken to be a public act, and should be judicially taken notice of as such by all judges, justices, and others, without being specially pleaded.

At the trial before Lord Lyndhurst C. B. at the Middlesex sittings after Michaelmas term 1833, the act of parliament which was produced in evidence had not been exemplified under the great seal, and there was no proof that it had been compared with the original roll in the parliament-office, or that it has been printed by the king's printer. It further appeared that certain persons had taken a lease of a piece of land in Islington upon which the drain in question was constructed, for the purpose of building houses, which they agreed to erect, under the inspection of the lessor's surveyor for the time being. The defendant was such

surveyor; and during the progress of the work, applied m behalf of the lessees to the trustees under the act sanction the construction of a drain of a certain size, stipulated in their lease, along the line of a ditch m front of the ground built on. The trustees refused such permission, except on the terms that the drain should be made of the capacity of 13 feet. The lessees nowever built a smaller drain, and while one of the witnesies was engaged in arching it over, after a great part of it had been made, the defendant came to him and said "You must build it according to that which is ione." For the defendant it was objected, first, that it this was a private act of parliament, it should have seen regularly proved by a copy examined with the parliament roll; secondly, that the defendant being herely surveyor to the ground landlord, interfered only see that the contract entered into with his principal was fulfilled, and was not such a "person" as could fall within the words of section 145. The jury gave a verdict for the plaintiff on the 20th count, that be "did arch over a drain" contrary to the terms exiteised in a certain consent of the trustees.

Woodward v. Cotton.

In this term Steer obtained a rule to enter a nonsuit:

Holt showed cause in Easter term. It was unnecentery to prove the act of parliament by an examined opy. Brett v. Beales (a), which was relied on by the intendant, has been overruled in Beaumont v. Mounin (b). The other point was a question for the jury. The Court here stopped him, calling on

Steer to support the rule. All that the defendant national party who seeks to give a private of parliament in evidence, should prove that the py tendered, if printed, was procured at the king's

⁽a) Moody & M. 421.

⁽b) 10 Bing. 405.

Woodward v. Cotton.

printers. The clause in question does not make this public act; for if the intent of a statute be particular it shall, notwithstanding the words are general, b deemed a private statute (a). In Brett v. Beales (b) th evidence was rejected, though the copy of the act wa printed by the king's printer. [Lord Lyndhurst C. B That copy was rejected on account of its effect it evidence, not because it was not properly proveable it evidence without a copy examined with the parliamen roll, but rather because it could not be received for the purpose for which it was offered. If my interpretation is correct, it is not requisite to overrule that case; in the marginal note it is said, that by the clause in question an act of parliament private in its nature is not "admissible" in evidence against strangers; that is of course, because it is a private instrument, although declared to be a public act for some purposes. In Rex v. Sutton(c) it was held that a public act of parliament is admissible as primâ facie evidence of the existence of any facts which are stated in it. In the case of Brett v. Beales it was attempted to carry this doctrine a little farther, and Lord Tenterden held that as to its general nature and operation it was not a public act, though, still by the particular clause, it may be given in evidence as such. The case of The King v. Shaw (d) has been alluded to, where a private act was received in evidence without proper proof, but there the party objecting had himself put the act in operation. This act is of a private nature. because its provisions refer only to a single parish; and a statute which as to persons is general, but the matter thereof concerns singular things, as any particular manor or house, &c., or all the manors, houses, &c., which are in one or sundry particular towns, or in

⁽a) 6 Bac. Abr. tit. Statute (F.)

⁽b) M. & M. 421.

⁽c) 4 M. & S. 533.

⁽d) 12 East, 479.

one or divers particular counties, is a particular act which must be pleaded (a). It was even thought necessary to declare by a special enactment, that the Irish statutes, though made for one great province of the empire, should be received in evidence in Great Britain. 41 Geo. 3. U. K. c. 90. s. 9. But judges would not take notice of a private act unless it be pleaded, though it make void all proceedings to the contrary in such a case; the reason being, that it is important that the existence of public acts should not be put in issue because many ancient ones are lost; but that is not the case with modern private acts. Formerly, therefore, if a private act was not produced in an exemplification under seal, the party might plead nul tiel record (b). The effect of the introduction of this clause is only to save the necessity of pleading, and not to invest it with a public character. The mode of inrolment and promulgation, and of giving the royal assent, shows a distinction between public and private acts: a public act is inrolled by the clerk of parliament, and by him transcribed and sent to all sheriffs that it may be generally known, and the king's assent is given by the words le roy le veut. But a private act is only filed with the royal assent indorsed in the terms, soit fait come il est desire, and is never circulated by public authority. The law, therefore, has always required that a different degree of formality should be applied to the proof of a private act, and the plaintiff has not complied with it. He also mentioned a case of Bromhead v. ---- at Lincoln summer assizes 1833, tried before A. Park J. in which a distress of a horse for toll at Gainsborough bridge was sought to be justified under a private act containing a public clause. He stated that that learned judge, after conference with Taunton J., rejected the evidence for want of proper authentication.

Woodward v.
Cotton.

⁽a) Holland's case, 4 Co. 76. b.; Prigge v. Adams, Skinn. 350.

⁽b) 8 Co. 28. b. Com. Dig. Parl. (R. 5.)

WOODWARD v. COTTON.

As to the second point, the defendant was m person to whom the penalty could attach; for the j found that he was a surveyor for the lessor, a priindividual. This action being in the nature of a minal proceeding, the party who is charged must clearly brought within the spirit of the enactment, a penal law shall not be intended by construct Dwarris on Statutes (a). "The rule which has t formly been observed by all judges since the revoluti requires that all penal laws should be constr strictly; that no case should be holden to be reach by them, but such as are within both the spirit and letter of such laws (b)." Here the defendant is within the words of the act, which require that drain shall be narrowed, or filled up, or arched o by any person without the consent of the trustees; the defendant has, personally, done no act that is h forbidden, nor is he within the spirit; for at most, has only given directions for other persons that an a should be completed as it had been begun.

Lord Lyndhurst C. B.—The case of Brett Beales must have been misunderstood, or, from son thing equivocal which appears in its terms, is min ported. The copy of the act of parliament there t dered in evidence was rejected on the ground of effect when admitted in evidence, not because it min not be received in evidence as an instrument proper proved. The whole reasoning of Lord Tenterds judgment goes to show that it could not be received for the object for which it was offered, as it had effect or operation on the question; that is very similar to Beaumont v. Mountain. The history of the progr

⁽a) P. 376.

⁽b) Per Best C. J. in Fletcher v. Lord Sondes, 3 Bing. 580; also Bayley J. in Denn v. Diamond, 4 B. & C. 243; and Parks J. in Meirelle Banning, 2 B. & Adol. 915; see R. v. Croks, Cowp. 26.

of these enactments is this: originally private acts of parliament could only be proved by a copy which had been examined with the parliament roll; that mode was found to be so expensive, that the legislature, to avoid the inconvenience, introduced a clause into such acts, that copies printed by the king's printer should be admitted in evidence. A difficulty then arose in proving that the copy produced had been printed by the king's printer; to obviate which the clause now in question was inserted, that certain acts should be deemed public acts. With regard to the other point, the jury found that as the defendant assisted, by his directions, the persons occupied in the work, he is personally liable though he did not engage in it with his own hands. If I direct a man to commit a misdemeanor, and he obeys me, I am guilty as well as he, for we are both principals.

1834. WOODWARD COTTON.

The rest of the court concurred.

Rule discharged.

EMERY, surviving partner of RICH deceased, against DAY.

TNDEBITATUS assumpsit for goods sold, work and The statute of labour, and on the money counts, on promises to assumpsit be-

limitations in gins to run

from the time when the cause of action accrues. Therefore, where by a local turnmext, the expenses of erecting toll-houses &c, a builder who brought an action for work and labour in so doing, more than six years after the work done, but within six years of the time when the trustees had funds in hand, by having paid off the expases of the act, it was held that he was too late, as the action was maintainable immediately after the work done, though the execution would have been postponed

Where a local turnpike act provided that all orders of the trustees should be entered in a book kept for that purpose, an order by them to pay a bill is not an act done so as to take a debt out of the statute of limitations, under 9 Geo. 4. c. 14., unless it is so entered in writing; the only act capable of taking a case out of the statute being the payment of principal or interest.

A clerk to turnpike trustees is not personally liable under a clause by which they may sue and be sued in his name.

EMERY

U.
DAY.

the plaintiff and one Rich his partner in his life-time; and another set of counts on promises to the plaintiff as surviving partner of Rich. Pleas: general issue and statute of limitations. The action was brought for work done in 1823 by plaintiff and his partner in erecting a toll-house for the trustees of a turnpike road, under a contract which had been agreed upon at a meeting of the trustees on 7th October in that year, and was entered in their minute book. The defendant was clerk to the trustees appointed under 54 Geo. 3. c. 180., intituled "an act for repairing the road from Potton in the county of Bedford, and Gamlingay in the county of Cambridge, to Eynesbury in the county of Huntingdon." The act contained a clause "that all monies arising from subscriptions or tolls, or by borrowing or otherwise, should be vested in the trustees and appropriated in manner following: first, to pay the expenses of the act; secondly, of the toll-houses and bridges; thirdly, the interest of money borrowed; and fourthly, the principal borrowed." By another clause, "the trustees were to sue and be sued in the name of their clerk."

The trustees, at a meeting in 1829, made an order that the tradesmen should be paid, and the defendant said he had an order to collect the money to pay them accordingly; but this order was never entered in their book. The trustees at that time had not paid off the expenses incurred in passing the act: they had not funds till 1829. At the trial before Denman C. J. at the last assizes for the county of Cambridge, it was objected that the evidence did not support the claim against the defendant for goods sold and work and labour done "for the defendant at his request," as the work was done not for the defendant but for the trustees; and that the act gave no right of action against the clerk personally, but only directed that the

trustees shall be sued in the name of their clerk. The learned chief justice upon this directed a nonsuit, giving leave to move to enter a verdict for the plaintiff or have a new trial.

EMERY v. DAY.

Kelly showed cause. As the case was presented at the trial two points arose on the plea of the statute of limitations; first, that as by the provisions of the turnpike act the trustees were to be compelled to pay the expenses of that act before they paid the tradesmen employed, the statute did not begin to run till the expenses of the act were paid; secondly, that the order of the trustees in 1829 was an "act done," so that no acknowledgment in writing was necessary, or if it was, the usual course being to enter such orders in a book. it must be assumed to be entered there, as there was no proof that it was not in writing. As to the second point, there must be positive proof of some writing to take the case out of the statute, but in this case the presumption of any writing was negatived. turnpike act, all orders of the trustees are to be made at their meeting by a majority present; and by a subsequent clause, all orders are to be entered in a book and signed by the trustees, and such entries are to be deemed originals. The book was in court, but no order appeared. [Parke B. There is nothing in the second objection; the only point is, whether or not this debt can be sued for on a count for money had and received under the clause in the act for the appropriation of the money by the trustees, or whether that clause is simply a direction to the trustees how to apply the money without altering the nature of the contract.] [Alderson B. Were the goods sold to be paid for only when money was in hand? There is nothing in the contract to defer the time of payment till they were in funds; and if there had been, there is no evidence to

ENERY v. DAY.

show that the trustees had not money in hand ti within six years before the commencement of this action [Parke B. The true question is, whether the trustee did not contract to pay immediately, or whether th clause as to the appropriation of the tolls makes an difference in the time of payment.] The days enabling parties to sue the trustees in the name of their clerk does not make him personally liable. [Alder son B. Wormwell v. Hailstone (a) decided that h would only be liable to execution in respect of the trus funds in his hands. If an action may be brought against the clerk at any time, it shows that the operation of the statute commences at once, and that its operation is not postponed till the trustees are in funds. Parke B The question is, when the cause of action accrued, no when the defendant could give satisfaction.] Court here called on

Biggs Andrews and Austin in support of the rule The nature of this act shows that the legislature coatemplated the building toll-houses &c. by the trustees be fore they could be in funds to pay for them. [Parke B By section 31, they might have borrowed money of mortgage of the tolls.] The act compels the trustee to build the toll-houses, but does not contemplate loans for this purpose. The trustees are only liable to pay in respect of funds received by them for tolls under the act. The plaintiff deals with them or their clerk, not as individuals but under the act. Unless they were in funds at the time of the judgment he could not have got judgment in the action; so that there was no necessity of introducing into the contract any stipulation as to the time of payment. Nor is price stipulated for, but only that the work shall be done in a workmanlike manner. The plaintiff contracts on the footing of the

them to borrow, and can get no fruitful judgment against them. Then can his right to recover accrue on the execution of the work? [Parke B. It may be a contract to be paid at once, though the plaintiff can get no satisfaction for several years after.] There is no cause of action till the trustees are in funds by having paid the expenses of the act. [Gurney B. Showing that they had no funds would not defeat the action, but would only go to delay the execution.] As to the statute of limitations, the order of the trustees is not a mere acknowledgment, but is an act done, and therefore not within 9 Geo. 4. c. 14.

fore not within 9 Geo. 4, c. 14. PARKE B.—Suppose a man to contract with a testater, but the cause of action not to arise till after his death, so that the party can only sue as executor; as for example, a contract to pay in a year, within which time the party entitled to payment dies, there is a right of action without an immediate remedy. The defendant might plead plene administravit; but it is inherent to every contract that an action lies on it immediately, unless there is a stipulation to the contrary. contract cannot be made other than a general contract on which an action lies as soon as the work is done. mer has the plaintiff taken it out of the statute of limitations by any note in writing. Where, as in this case, there is no act done by payment of principal or interest, there must, since 9 G. 4. c. 14., be an acknowledgment in writing in order to take a case out of the statute of

The other Barons concurring,

Rule discharged.

(a) See Corpe v. Glyn, 3 B. & Adol. 801.

limitations: then if the plaintiff relies on the order of the trustees, he must show the terms of it; and as he has not done so, the rule must be discharged (a).

EMERY V. DAY.



CASES IN TRINITY TERM

1834.

700

Morris against Parkinson.

By the practice of a borough court its process was directed to the serjeant-atmace, naming him, and to one or more persons also named, who are appointed by him to execute the process, having given him security to account to him as well for all fees received as for acts done in their They offices. attend at his office in order to receive process, and are dismissed by him at pleasure. A ca. sa. which had issued, directed to " T. P. serjeant-at-mace of the borough, and also to A. L." not subjoining " his officer, was executed by A. L. without any

EBT for escape against the defendant, serjeant-atmace for the borough of Liverpool. ration stated, that whereas at the court of record of our lord the king of the borough of Liverpool, holden at Liverpool in the county of Lancaster, in the common hall of the same borough, and within the jurisdiction of the same court, that is to say, on the fourteenth day of February 1833, before C. H., esq. the then mayor, and R. G. and J. A. the then bailiffs of the said borough and judges of the same court, according to the custom of the same borough from time immemorial there used and approved of, came the plaintiffs by &c.: and there at the same court levied their certain plaint against one Thomas Jones on a certain ples of trespass on the case on promises to the damages of the plaintiffs of 301, for a certain cause of action arising to the plaintiffs within the jurisdiction aforesaid, to wit, for the non-performance of certain promises and undertakings then lately within the jurisdiction aforesaid made by the said Thomas Jones to the now plaintiffs, (the same being then and there matter and cause of action within the jurisdiction and cognizance of the same court,) and such proceedings were thereupon had in the same court, that afterwards, to wit, at the said court of our said lord the king, of the borough of L. aforesaid, holden at L., in the county aforesaid, in the common hall of the said borough, and within the

warrant, which by the practice, was never issued. Parol testimony was admitted to show the above facts relative to the officers' appointment and situation. It was also proved that when parties wish process to be executed by a person, not such officers, the serjeant-at-mace is applied to, and specially indemnified. Bail-bonds are taken in his name, and he is served personally with rules to return writs. The returns are made in the names of the officers actually executing them, but attachments for not doing so, &c., issue against the serjeant-at-mace. Held, in an action for a voluntary escape, that A. L. was the officer of the serjeant-at-mace, who was there

fore responsible for his acts in the execution of process.

1834. Morris

PARKINSON.

jurisdiction of the said court, that is to say, on the 11th day of July 1833, before the said &c.: the plaintiffs, by the consideration and judgment of the same court, according to the custom of the said court and borough therein from time immemorial used and approved of, recovered against the said Thomas Jones 451. 3s. 4d., which in and by the said court, holden as last aforesaid, were adjudged to the plaintiffs for the damages which they had sustained, as well by reason of the not performing certain promises and undertakings before then made by the said Thomas Jones to the plaintiffs within the jurisdiction aforesaid, to wit, the promises and undertakings first aforesaid, as for their costs and charges by them about their suit in that behalf expended, whereof the said Thomas Jones was convicted, as by the record and proceedings remaining in the said court of L. aforesaid, and within the county aforesaid, and within the jurisdiction aforesaid, more fully appears; and which said judgment at the time of issuing the precept, and of the arrest and escape hereinafter respectively mentioned, remained in full force and effect, and not reversed, satisfied, or otherwise vacated: and the said plaintiffs further say, that afterwards, to wit, on 22d August 1833, to wit, at L. aforesaid, in the county aforesaid, and within the jurisdiction aforesaid, for the recovery of the said sum of 451. 3s. 4d., the plaintiffs sued and prosecuted out of the said court then holden at Liverpool aforesaid, in the county aforesaid, and within the jurisdiction of the said court, before the said mayor &c. of the said borough, and judges of the court, according to the custom of the said court and borough there from time immemorial used and approved of, a certain precept, commonly called a capias ad satisfaciendum, against the said Thomas Jones, by which said precept it was commanded to the defendant, then being serjeant-at-mace of the said borough, and Morate

Parkinson.

also one A. Lord, which said A. Lord, then and thence until and at the time of the arrest and e hereinaster mentioned, was the officer and bailiff of said defendant, to wit, at &c., that they, or one of t should take the said Thomas Jones, if he shoul found within the said borough, and him safely keep that they, or one of them, should have his body be the mayor and bailiffs at the then next court of said borough, to satisfy the plaintiffs the said su 451, 8s. 4d, so recovered as aforesaid, and that on them should then and there have that precept; an the foot of the said precept was then and there wr a memorandum, whereby the said defendant and said A. Lord were directed to take the said am 461. 3s. 4d. which said precept with the memorand afterwards, and before the return thereof, to wit, on August 1833, at L. aforesaid, and within the juris tion aforesaid, was delivered to the defendant, wh the time of suing forth the said precept as afores and from thenceforth until and at and after the each of the said Thomas Jones hereinafter mentioned. serjeant-at-mace of the said borough, and as a serjeant-at-mace during all the time last afores according to the custom of the said court and boro there from time immemorial used and approved had and ought to have had the execution of the precept to be executed in due form of law; by virtue which said precept the defendant, so being serieant mace of the said borough as aforesaid, afterwards before the return of the said precept, to wit, on the and year last aforesaid, and within the jurisdict aforesaid, to wit, at &c. took and arrested the s Thomas Jones by his body, and then and there by vir of the said precept had and detained him in custody in execution for the said sum so mentioned the said precept as aforesaid, and kept and detain

sim in his custody in execution for the said sum of money so mentioned in the said precept as aforesaid, within the jurisdiction aforesaid, from thence, until the defendant, so being serjeant-at-mace as aforesaid, afterwards, to wit, on the day and year last aforesaid. within the jurisdiction aforesaid, at Liverpool aforesaid, in the county aforesaid, without the leave or licence, and against the will of the said plaintiffs, suffered and permitted the said Thomas Jones to escape and go at large, and the said Thomas Jones did then and there escape and go at large wheresoever he would out of the custody of the defendant, he the defendant so being serjeant-at-mace as aforesaid, and the said sum of money so mentioned in the said memorandum as aforesaid, being then and still wholly unpaid and unsatisfied to the plaintiffs, to wit, in the county aforesaid, whereby an action hath accrued, &c. the general issue. At the trial before Alderson J. at the spring assizes for Lancashire, the judgment in Morris v. Jones was proved by an office copy, and the writ of ca. sa. (a) was shown to have been delivered to Alexander Lord, who was in attendance at the defendant's office, who arrested Thomas Jones under it, and after keeping him in custody twenty-four hours let him go at large. No warrant was issued on the writ. It was shown that the serjeant-at-mace of the borough court

MORRIS

V.

PARKINSON-

(a) The form was as follows:—

Berough of Liverpool, It is commanded to Timothy Parkinson, serjeant-attowit.

Inace of the said borough, and also to Alexander
Lord, that they or one of them take Thomas Jones, if he shall be found
within the said borough, and him safely keep, so that they or one of them
have his body before the mayor and bailiffs at the next court of the said
borough, to satisfy James Morris 451. 3s. 4d., which he lately in the court of
the said borough by the judgment thereof recovered against the said
Thomas, for the damages which were sustained as well by reason of the nonperformance of certain promises and undertakings lately made by him to
the said James at the borough aforesald, as and for the costs and charges
about his suit in that behalf expended; whereof the said Thomas is con-

1834.

MORRIS

v.

PARKINSON.

is an officer employed in executing its process, and th defendant as such had appointed Lord and two other to be his officers to execute process of that cou They are usually called officers of the serjeant-at-max Lord, like others so appointed, had, on his appoint ment, given bond to the defendant to account to hi for the fees and profits and to indemnify him general By the practice of the court, its writs are directed to the serjeant-at-mace by name, and to one or more of thes his appointees, also named jointly with him. instances they are directed to him and to other person who are not his officers appointed as above, but he then applied to and specially indemnified. Each wr is delivered to the person who is to execute it, no was rant being ever made out upon it by the serjeant-a mace. He takes the fees for execution of all process No return is made by the officer till a rule to return the writ is served personally on the serjeant-at-mace The officer who executed the writ then returns it it his own name. Bail-bonds are taken in the name of the serjeant-at-mace, and attachments issue agains him on any default. He dismisses the officers. contended that the writ should have been directed to the serieant-at-mace alone, who was the only prope officer of the court to execute process, and that the arrest being therefore illegal no action would lie for a escape. The only question of fact left to the jury was whether Lord allowed Jones to go out of custody with out the plaintiff's licence. They found that he did

victed in the said court, as by the record thereof it does appear, and the they or one of them have then and there this precept. Dated 8th Augus 1833.

By the court, 14th August 1833.

Cross, attorney for the plaintiff.

Damages£25 8 0
Debt 19 15 4
Total 45 3 4

and that the debt in Morris v. Jones had been virtually satisfied, but not the costs. Alderson J. nonsuited the plaintiff, on the ground that the defendant was not liable for the acts of Lord to which he was not personally a party, and gave leave to move to enter a verdict for the plaintiff for such sum as the court should think fit. Cresswell having obtained a rule accordingly in Easter term,

1834.

Morris

v.

Parkinson.

F. Pollock and Wightman now showed cause. Though the serjeant-at-mace has by peculiar usage the patronage of appointing these officers in the first instance, they are no less officers of the court when so appointed, and are recognized as such by the court, which directs writs to them, not exactly as officers of the serjeant-at-mace, but nominatim, and receives returns of writs from them in like manner. But first there is a variance in proof between the declaration. which alleges the writ to have been delivered to the defendant as serjeant-at-mace, and the evidence, which shows it to have been delivered to Lord the officer without ever coming to the hands of the defendant. [Alderson B. That involves the same question; for if they are the officers of the serjeant-at-mace, a delivery to them would be a delivery to him.] In Foster v. Blakelock (a), Bayley J. distinguishes between the case where a party leaves it to the sheriff to execute a writ by his own officer, nominated by himself, and that where an attorney has selected an officer to execute the process. Officers of the serjeant-at-mace are not necessarily employed to execute process, and it is sometimes entrusted to others. Had the writ been directed to the serjeant alone, he might have selected. whom to execute it; whereas, in this case, he was deprived of any opportunity to do so. The borough court recognizes the serjeant-at-mace and his officer as

(a) 5 B. & Cr. 328.

MORRIS
TO.
PARKINSON.

being each of them principals, and must presume that the former executes the writ till informed of the contrary by the return of the officer who actually does in The peculiar practice of the court distinguishes this can from that of a sheriff, who being the very individual recognized by the superior courts as executing process is therefore liable for the acts of his bailiffs, of who no cognizance is taken. Here, though Lord gave a indemnity bond to the defendant, yet as the court by it own act selected him to execute this process, he became the direct and immediate officer for that purpose, more of the serjeant-at-mace, through whose hands the process never passed, but of the court. How then can the serjeant-at-mace be liable for his acts?

Cressicell and Addison supported the rule. The whole question being, whether Lord was an officer of the borough court or of the serjeant-at-mace, it has be assumed throughout that he is an officer of the cou because he was named in the writ. All the other e dence goes clearly to show that Lord was only the offic of the defendant, who, as serjeant-at-mace, is the on person having execution and return of the process oft borough court, and stands in the same situation as t sheriff of a county, to whom writs out of the superi courts must be directed, or are void, Grant v. Bagge Bracebridge v. Johnson (b). Then, if in point of k the writ could issue to no one else, Lord could deri no authority but from the defendant, who would the fore be liable for all his acts. The officers names a only introduced into the writs because, as it is not t practice for the serjeant-at-mace to issue warrants, must otherwise execute all process in person. had been named in the writ as a deputy or officer the serjeant-at-mace, no doubt of the defendan

⁽a) 3 East, 128.

⁽b) 1 Brod. & B. 12; and see 6 Bing. 194; 2 B. & Adol. 416.

insibility could have been entertained; and here laintiff has established his character as deputy by nsic evidence. Lord could not have interfered I except in that character; for though by the tice the serjeant-at-mace does not return the writ rson, he is both ruled to return it and attached if oes not; so that the return by the officer is that he serjeant-at-mace in the name of his deputy. very of the writ to the defendant was proved in same manner as that to the high sheriff, which is ys so laid, and supported by proof of delivery at his er-sheriff's office. | Lord Lyndhurst C. B. s, though directed to another person by name as as to the defendant as serjeant-at-mace, seem xted to him as principal, and to the other as his ant or officer.] Had Lord made a return instead e defendant it would make no difference; for it is down in Comyns's Digest, tit. Officer (D. 5.), and Return (C. 2.) (a), that a deputy ought regularly to n his office in the name of his principal, but that ct by a deputy in his own name will be good, exin special cases, and a return to which the sheriff not put his name is good though he shall be rced.

MORRIS
v.
PARKINSON.

Ford LYNDHURST C. B.—The evidence shows that see persons are appointed by and indemnify the jeant-at-mace, and are styled his officers: Lord is pointed his officer and is so styled; and although the rds "his officer or deputy" do not appear in the titself, we are of opinion that the extrinsic evidence iciently shows that he is so. It appears that plainicall on the serjeant-at-mace to return the writs, by ng him to do so; he therefore has, in fact, the executof the process. But it is argued that the return is

⁽a) See Com. Dig. tit. Amendment, (G. 12.)

1834.

MORRIS

v.

PARKINSON.

in fact made in obedience to such rules by the officer who made the arrest in his own name, and that he receives the fees: but it appears to me that he makes such return as the defendant's deputy. He gives bond to account for these fees to the serjeant-at-mace, and for indemnifying him generally. The process therefore appears to be directed to Lord as the officer of the serjeant-at-mace, who is therefore responsible for his acts in the execution of process. The verdict must be entered for 194, 15s., the amount of the costs, the debt having been virtually satisfied.

BOLLAND B.—Though the process does not state Lord to be an officer of the serjeant-at-mace, I see no objection to admitting parol evidence to show that he was in fact such officer, and that by the practice processes are directed to him as such.

ALDERSON B.—The words "his officers" should be inserted in these writs after the name of the individualist to which they are directed, for the omission of these compels a plaintiff to give evidence of their connection with the serjeant-at-mace. It was here proved that they are appointed by the serjeant-at-mace, who indemnified for their acts; that he takes the feel received by them, is ruled to return writs, and attached for disobedience to such rules. On that evidence the case stands as if the defendant appointed Lord his officer in this and each particular case. The fact that the defendant is informed and takes special indemnity in cases where it is desired to direct process to person not appointed his officers, struck me as material.

GURNEY B.—The evidence taken together shows that the officers are appointed by the defendant as his deputies. He is accordingly liable for their acts.

Rule absolute.

IN THE LORD TREASURER'S REMEMBRANCER'S OFFICE.

1834.

The King against the Mayor and Inhabitants of the City of London.—In the matter of the fine set on MOZELY WOOLE.

WOOLF was indicted with Levy and Kinnear at The charters the Old Bailey sessions in 1819, for a misdemea- London vest in nor (a conspiracy) committed within the city of Lon-that body, don. The indictment was removed into the court of demeanors King's Bench by certiorari. At the trial at the Guild-committed hall sittings in 1819, before Abbott C. J., the defend-city, though ants were convicted, and being afterwards brought up imposed or adjudged by by writ of habeas corpus, judgment was given by the the court of justices in banc at Westminster (a), that Woolf should sitting in pay a fine of 10000l., and be imprisoned for a certain banc at period (b); Levy was also fined 5000l., and ordered after a trial at to be imprisoned. These fines were estreated in the the sittings at Guildhall. court of Exchequer, and the right of the crown to them was specified in a document called a constat. lodged in that court, under the hand of the deputy clerk of the foreign estreats. The city of London disputed the right of the crown to Woolf's fine, by coming in and traversing the constat in the following manner.

King's Bench, Westminster.

More Common Matters of Easter Term, In the 59th year of the reign of king George 3.

England. An estreat of fines imposed and set in the court of our lord the king, before the king himself at Westminster, of Easter term, in the 59th year of the reign of king George 3., but not paid.

London.—Of Lewis Levy late of London, merchant, for certain conspiracies and misdemeanors, whereof

(a) See now 11 G. 4. & 1 W. 4. c. 70. s. 9. (b) 2 B. & Ald. 609.

The King
v.
The Mayorand
Inhabitants of
the City of
London.

he (with others) is indicted, and by a jury of the country is convicted, and his fine on the account aforesaid is taxed by the court here at 5000l., and he is sentenced to be imprisoned in his majesty's gaol at Glocester, in and for the county of Glocester, for the term of two years; and it is ordered, that the marshal of the Marshalsea of this court, or his deputy, do deliver up the said Lewis Levy to the custody of the keeper of the said gaol at Glocester, to be kept in safe custody in execution, and until he shall have paid the said fine. And the said sheriffs of London are commanded of the goods and chattels, lands and tenements of the said Lewis Levy, to levy the said fine, and to have the said sum of money in this court, in three weeks of the Holy Trinity. And the like command is given to the sheriff of Middlesex, 5000l.

London.-Of Mozely Woolf, late of London, merchant, for certain conspiracies and misdemeanors, whereof he with others is indicted, and by a jury of the country convicted, and his fine on account of the aforesaid is taxed by the court here at 10000l., and he is sentenced to be imprisoned in the house of correction in Cold Bath Fields, in and for the county of Middlesex, for the term of two years; and it is ordered, that the marshal of the Marshalsea of this court, or his deputy, do deliver the said Mozely Woolf into the custody of the keeper of the said house of correction in Cold Bath Fields, to be kept in safe custody in execution, and until he shall have paid the said fine; and the sheriffs of London are commanded, of the goods and chattels, lands and tenements of the said Mozely Woolf to levy the said fine, and to have the said sum of money in this court in three weeks of the Holy Trinity; and the like command is given to the sheriff of Middlesex. 10000l. (x de li.)

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The claim of the mayor and commonalty and citizens of the city of London, upon the account of E. H. Lushngton esq., coroner and attorney of our sovereign lord king George 4., accounting for monies by him re- The Mayor and zived, and payable to his said majesty, amounting to **i912l**. 18s. 10d. The same mayor and commonalty and citizens, by William Foxton their attorney, claim certain fine of 5000l., and also a certain fine of 100001., which have been retained as forfeited, and ereinafter particularly mentioned, but with which the aid coroner and attorney is not charged, only to the mount of 59121. 18s. 10d., part of the said sum of 00001, in his account, before the clerk of the pipe of is said majesty's Exchequer, in these words, to wit: Here were set out again from the constat the estreats rhich have just been stated, concluding "as by a conat thereof under the hands of Thomas Farrar, deputy erk of the foreign estreats of this court, appears":] hich said sums of 5000l. and 10000l. the said mayor ad commonalty and citizens of the said city of London aim to belong to them, for that the said Lewis Levy. nder whose name the said sum of 5000l. in the foresaid constat is demanded, and the said Mozely **Foolf**, under whose name the said sum of 10000l. in e same constat is particularly demanded, were seveally and respectively at the times when the said fines ere so set and imposed upon them, by the said court four said lord the king, before the king himself, the siants of the said mayor and commonalty and citizens ithin the said city of London, and which said sums of 3001. and 100001. the said mayor and commonalty nd citizens of the said city of London claim to belong them: for that the said Lewis Levy and the said fozely Woolf were severally and respectively at the me when the said offence and misdemeanors were mmitted, in respect whereof the said fines were so

1834. **~** The King Inhabitants of the City of LONDON.

1834. The King Inhabitants of the City of LONDON.

set and imposed as aforesaid, resiant within the city London; and which said sums of 5000L, and 1000 the said mayor and commonalty and citizens of t The Mayor and city of London, claim to belong to them; for that t said trespasses, offences, and misdemeanors, in resp whereof the said fines were so set and imposed up the said Lewis Levy and Mozely Woolf as aforesi were committed by them the said L. Levy a M. Woolf within the said city of London; and als for that Henry 6th, late king of England, by his lette patent, dated 26th October, in the 23d year of h reign, did grant to the citizens aforesaid, and the successors, all manner of fines, issues forfeited or to l forfeited, redemptions, forfeitures, pains, and amerci ments, of and for all manner of matters, causes, at occasions, and all things aforesaid; and whatever trespasses, riots, insurrections, offences, misprision extortions, usurpations, contempts, and other mid meanors, done or to be done in the city or arbur aforesaid, before the mayor, recorder, and aldermen the city aforesaid for the time being, the justices him, his heirs or successors, assigned or to be assigned to hear and determine felonies, trespasses, and misd meanors in the city aforesaid, or the suburbs there or the justices assigned to hold pleas before the sa lord the king, his heirs or successors; the justices the common bench, the treasurer and barons of the exchequer, or the barons of the exchequer, or whats ever other justices or officers of him, his heirs or su cessors, adjudged or to be adjudged, together with the assessments and levying of the same, as often and who it should be needful, and treasure trove in the ci aforesaid or the suburbs thereof; and also waifs at strays, and goods and chattels of all and singular felo and fugitives, for felonies by them committed in the city or suburbs aforesaid, or adjudged or to be a judged before the said king, or his heirs or successors, or any of the justices aforesaid; and all merchandize and victuals which in coming to the city aforesaid to be sold in the said city or the sublittle thereof, and in TheMayorand the water of Thames and elsewhere within the said city and liberties and suburbs thereof, should be found forestalled and regrated, and which therefrom thenceforth should happen to be forestalled or regrated, and that the said citizens should have all and every thing which should happen to be adjudged by the said mayor or the justices aforesaid, to be due or to belong to the said king, his heirs or successors, of or for any recognizances or securities made for good behaviour and observing of the peace, before them or any of them, within the city aforesaid or the suburbs, thereby broken and not observed.

The claim then set out, stat. 1 Ed. 4. c. 1. ss. 3. 13. confirming the liberties and franchises of the city; then a charter of 20 Hen. 7. and another charter dated 18th Oct. 14 Car. 1. containing this clause: --- And the said king for himself, his heirs or successors, did also give and grant to the aforesaid mayor and commonalty and citizens of the city aforesaid, and their successors, all recognizances, &c., and also fines and issues of jurors, and all other issues, fines, and amerciaments, forfeited and to be forfeited, of and for all and singular the matters, causes, and occasions aforesaid; and of and for whatsoever transgressions, riots, offences, misprisions, extortions, usurpations, contempts of laws, violations, and other misdemeanors, done to or to be committed in the city aforesaid, or the liberties of the same, before the mayor, recorder, and aldermen of the said city for the time being, or any of them, or any of the justices of the said king, his heirs and successors, concerning the peace in the city aforesaid, or before the justices of him, his heirs and successors, assigned

1834. The King Inhabitants of the City of LONDON.

The King
v.
The Mayor and
Inhabitants of
the City of
LONDON.

or to be assigned to hear and determine felonies, transgressions, and misdemeanors in the city aforesaid, or the liberties of the same; or before any justices of him, his heirs or successors, of nisi prius, for trying of things, causes, and matters in the city aforesaid, or other justices of him, his heirs and successors whatsoever, or any of them in the city aforesaid, adjudged or to be adjudged forfeited, or to be forfeited, together with the assessments and levies of the same, as often and when there should be need, saving nevertheless always and reserving to the said king, his heirs and successors, all and all manner of issues and amerciaments, commonly called fines or issues royal, thereafter from time to time to be imposed upon them the mayor, aldermen, and sheriffs of London and Middlesex for the time being, or one or any of them respectively, or by them to be forfeited and paid. A charter of 15 Car. 2. having been stated, the claim concluded thus:-

Wherefore the said mayor and commonalty and citizens of the city of London are, and at the said times when the said 5000l. and 10000l. were set out and imposed as aforesaid, were, a body corporate in ded and name, and persons able in law to plead and be impleaded, and to challenge, demand, and prosecute al the liberties, privileges, and franchises aforesaid, by the aforesaid name of mayor and commonalty and citizens of the city of London; by virtue of all which premises the said mayor and commonalty and citizens do class to belong to them the aforesaid sum of 5000%, so # aforesaid set and imposed by the said court of our aid lord the king before the king himself upon the sid Lewis Levy, and the said sum of 100001, so as aforesaid set and imposed by the said court of our said lord the king before the king himself upon the said Mozely

If; wherefore they pray that their claim may be ved &c.

eplication.—And Sir Thomas Denman knt., atey-general of our said lord the now king, being The Mayorand ent here in court on behalf of our said lord the , and having heard the said claim of the said mayor commonalty and citizens of the city of London of allowance to them of the said fine of 10000l. set imposed upon the said Mozely Woolf as aforesaid, our said lord the king says, that notwithstanding hing by the said mayor and commonalty and citizens re alleged, the said fine of 10000l. ought not to be wed to them, because the said attorney-general of said lord the king says, that the said Mozely Woolf, er whose name the sum of 10000l. in the aforesaid stat is particularly demanded, was not at the time n the said fine was so set and imposed upon him the said court of our said lord the king before king himself at Westminster, the resiant of the said or and commonalty and citizens within the said city London, as stated in their said claim, and this the attorney-general prays may be inquired of by the And the said attorney-general of our said the king further says, that the said Mozely Woolf not at the time when the said offence and miseanor was committed in respect whereof the said was so set and imposed upon him the said Mozely If as aforesaid, resiant within the city of London, tated in the said claim of the said mayor and comalty and citizens; and this he the said attorneyral prays may be inquired of by the country &c. I the said attorney-general of our said lord the further says, that the said fine of 10000l. so set imposed upon the said Mozely Woolf as aforesaid, not a fine, issue, forfeited redemption, forfeiture, 1 or amerciament set or imposed within the said city

1834. The King Inhabitants of the City of LONDON.

The King
v.
The Mayor and
Inhabitants of
the City of
LONDON.

of London, or suburbs or liberties thereof, or by or before the lord mayor, recorder, and aldermen of the said city, or any or either of them; and this the said attorney-general of our said lord the king prays judgment if the said fine of 10000L ought to be allowed to the said mayor and commonalty and citizens of the city of London.

Rejoinder.—And the said mayor and commonalty and citizens of the city of London, as to the said replication of the said attorney-general by him first above pleaded, and which he bath prayed may be inquired of by the country, do the like. And the said mayor and commonalty and citizens of London, as to the said replication of the said attorney-general by him secondly above pleaded, and which he hath prayed may be inquired of by the country, do the like. And as to the replication of the said attorney-general by him lastly above pleaded, the said mayor and commonalty and citizens say, that notwithstanding any thing by the said attorney-general therein above alleged, the said fine of 10000l. ought to be allowed to them, because they say, that the indictment on which the said Movely Woolf was charged (together with others) with the said trespasses, offences, and misdemeanors, in respect whereof the said fine of 10000l. was so set and imposed upon the said Mozely Woolf as aforegaid, was presented and found by the jurors of our then lord the king of and for the city aforesaid, at the general session of over and terminer of our late sovereign lord George the third, holden for the city of London at Justice Hall in the Old Bailey, within the parish of St. & pulchre, in the ward of Farringdon Without, in London aforesaid, on Wednesday the 6th day of May, in the 58th year of the reign of his said late majesty king George the third, before the then mayor, the then recorder, and certain aldermen of the said city for the

3 being; and also before certain fustices of his said majesty king George the third, and others their ws, justices of our said lord the king, assigned by ers patent of our lord the then king, made under The Mayor and great seal of our lord the then king of the united rdom of Great Britain and Ireland, to the several ices therein named, and others, or any two or more them, directed to inquire more fully into the truth the oath of good and lawful men of the city of udon, and by other ways, means, and methods, which they should or might better know (as well in liberties as without) by whom the truth of the ter might be better known of (amongst other things) confederacies, trespasses, contempts, oppressions, eits, and all other evil doings, offences, and injuries tsoever, and also the accessories of them within the aforesaid, (as well within liberties as without) by misoever and in what manner soever done, comzed or perpetrated, and by whom or to whom, when, , and after what manner, and of all other articles circumstances concerning the premises and every hem or any of them, in any manner whatsoever, and said premises to hear and determine according to law and custom of England; which said indictment said late majesty king George the third afterwards certain reasons caused to be brought before him to determined according to the law and custom of gland; and the said mayor and commonalty and tens further say, that the offences charged in the I indictment against the said Mozely Woolf, and of ch he has been convicted as aforesaid, were charged laid in the said indictment to have been committed, . were in fact committed within the said city of sdon. And the said mayor and commonalty and zens further say, that the said indictment was afterds tried at the sittings of nisi prius holden for the

1834. The King Inhabitants of the City of LONDON.

The King
v.
The Mayor and
Inhabitants of
the City of

LONDON.

said city of London, at the Guildhall of and within the said city, before the right honourable Sir Charles Abbott, knt., then the chief justice of our lord the then king, assigned to hold pleas before the king himself, John Henry Abbott then being associated to the said chief justice; and that the said Mozely Woolf, together with others, was thereupon found guilty of the premises charged upon him in and by the said indictment. And the said mayor and commonalty and citizens further say, that afterwards in the court of our lord the king, before the king himself, at Westminster, the said Mozely Woolf being brought there into court in custody of the keeper of his majesty's gaol of Newgate, by virtue of writ of habeas corpus, it was adjudged and ordered in and by the said court of our lord the king, before the king himself, at Westminster, that the said Mozely Woolf, for his offences aforesaid, should pay the said fine of 10000l. to our sovereign lord the king, and should be imprisoned in the house of correction in Cold Bath Fields, in and for the county of Middleser, for the term of two years; and it was further ordered by the said court, that the said marshal of the Marshalsea of his majesty's court of King's Bench, or his deputy, should deliver the said Mozely Woolf into the custody of the keeper of the said house of correction in Cold Bath Fields, to be kept in safe custody in execution of the said judgment, until he should have paid the said fine of 10000l.; and this they the said mayor and commonalty and citizens are ready to verify, wherefore they pray judgment, and that their said claim to the said fine of 100001. may be allowed to them &c. Demurrer and joinder.

Wightman for the crown. The question is, whether under the charters of Hen. 6. and Car. 1. or either of them, the city is entitled to the fine imposed by the

Bench at Westminster, on the ground that the was committed in the city by Woolf, who at that and also at the time of imposing the fine, was a in the city. These are the only grounds stated in TheMayorand im of the city; and it is on the validity of that as set out in the traverse of the constat, that the will have to determine without reference to the leadings. The crown contends that the city should arther alleged in their claim that the fine was adand imposed in the city, or at least, that the trial indictment took place within the city. On the face r claim the fine appears to have been imposed "by urt of our lord the king before the king himself," to say, by the court of King's Bench at Westminpon a resiant of the city of London, for a misder committed therein. As the claim of the city is ed upon the charters set out in it, it must be ht distinctly within their terms. For the construcf a grant of the crown differs from the grant of a t in this, that it should be construed most strictly t the grantee, nor will any thing pass to him clear and express words (a). Thus it was dein Rex v. Sutton(b) that choses in action of a felo o not pass by a crown grant of the "goods and s of felons," nor mines royal, as gold or silver by a grant of "all mines" or of "soil and waste." **F** Mines (c). Thus, when Hen. 7. being seised of anors, viz. Ryton and Condor in Salop, granted Erta scientià et mero motu illud manerium de C. cum pertinen' in com. Salopia," the grant

1834. The KING Inhabitants of the City of LONDON.

Earl of Cumberland's case, 8 Rep., 166 b. and the case of Alton Rep., 41 a. Thomas and Frazer's edit. vol. i., p. 101. n., 110. Saund. 273, 2 Roll. Ab. tit. Prerogative del Roy, C. pl. 2. citing

lowd. 314 a., 336 b., 339; 1 Rep. 46 b.

The King
v.
The Mayor and
Inhabitants of
the City of
London.

was held void, though had it been that of a subject it would have passed both manors (a). So where Edw. 6. granted to C. omnes terras dominicales manerii de Wellow &c., it was adjudged that customary lands held by copy, parcel of the manor, did not pass, though without doubt they would in a subject's case (b). Again, in Willion v. Berkeley (c) it is thus laid down: In the common law the grant of every common person is taken most strongly against himself and most favourably towards the grantee, but the king's grant is taken most strongly against the grantee and most favourably for the king. Keeping this rule in view, has the crown, by either or both charters, granted to the city of London fines imposed out of the city on persons guilty of offences committed within it? Now, the charter of Hen. 6. grants all fines, &c., of and for all manner of matters, causes, &c. done in the city, before the mayor &c., the justices assigned to hold pleas before the king, &c., &c., adjudged or to be adjudged, and treasure trove in the city aforesaid, or the suburbs thereof. The words "in the city aforesaid" only refer to "adjudged," and the grant only passes such fines for offences committed within the city as are also adjudged within it before any of the justices mentioned in the charter assigned to try misdemeanors within it, e. q. at courts of oyer and terminer. [Lord Lyndhurst C.B. The charter of Hen. 6. speaks of the treasurer and barons of the exchequer as of the court here, and not as of a part of a court elsewhere. Is any commission of oyer and terminer and gaol delivery ever directed to the The charter speaks of the courts at Watminster, which are named in their proper order; first, the justices assigned to hold pleas before the king him-

⁽a) Scacc. 29 Elis., stated 1 Rep. 46 a.

⁽b) Scacc. 15 Elis., stated 1 Rep., 46 b.; and see Plowd. 243.

⁽c) Plowd. Comm. 243.

elf, i. a. the King's Bench; second, the justices of the mmon bench, and then the treasurer and barons, or he barons of the exchequer. Then what prevents he city from taking fines imposed for offences comnitted within its limits, whether adjudged within hem, or in any of the superior courts at West-How is that claim inconsistent with the ninster? tharter of Hen. 6? It may be argued, however, that he charter of Charles 1. is couched in narrower erms. Any general effect which may be ascribed to he words of the charter of Hen. 6. is restricted by hat of Charles 1. the terms of which are so comprenensive and precise, that it appears like a regrant of ill the city privileges after a surrender of them. In hat charter the words "in the city aforesaid adjudged or to be adjudged," clearly apply to the first words of the clause by which fines are granted, and mean that Il fines for offences committed in the city and therein refore the mayor or other judges adjudged, are to be aken by the city. It would have been absurd to insert he more particular words at all, unless in a sense restrictive of the larger terms of the charter of Hen. 6.; nor in that view of the charter of Charles inconsistent with that of Hen. 6. In conveyances every restricion has its proper operation. General words in a mant may be overthrown by restrictive words, prorided the latter concur with the general words of the rrant; e.g. if A. give all his lands in B. in the tenure of G. and D., and he has lands in B., but not in the tenures named, yet all the lands pass; $Clay \vee Barnett(a)$.

The Kino
v.
The Mayor and
Inhabitants of
the City of
London.

Follett for the city.—The question is, whether, in water to support the claim of the city to this fine, it is becessary to show it to be imposed or adjudged within

⁽a) Godbolt, 237. M. 11 Jac. C. B. 14 Vin. Ab. 63, and 89, tit. Grant, H. 13.) pl. 63. and (Q.) pl. 4. See Altham's case, 8 Rep. 134, and larris & Wing's case, 3 Levins, 244; and Vin. Ab. tit. Grant, (H. 13.) pl. 39.

The King
v.
The Mayor and Inhabitants of the City of LONDON.

the city? Now, the facts admitted on the rejoin are, that Woolf committed the offence within the that a true bill was found for it at the Old Bai within the city, that the indictment was removed certiorari into the King's Bench, and tried at Ga hall in the city before the chief justice, and that fine was imposed by the court of K. B. at Westmins Even according to the rule of construction of cre grants laid down on the other side, the fine de belongs to the city under the charter of Hen. 6., wh grants to them all fines for offences committed wit the city before the justices in the charter name "adjudged or to be adjudged." Those justices a first, the mayor, recorder, &c., justices assigned to h and determine felonies &c. in the city, wis. at the (Bailey; then the courts of King's Bench, Court Pleas, and Exchequer, in their rank and order, m tioning "the justices" of each collectively as a con Then the grant cannot be intended as confined to fir actually adjudged within the city by those courts. no instance appears of their having ever sat there, a the Common Pleas, since 9 H. 3. M. C. c. 11. 1 become stationary at Westminster Hall(a), then is general of all fines for offences committed with the city, wheresoever adjudged by the courts name It is said that the clause in the charter of Charles 1 be an unmeaning repetition of the former grant, unk read in a sense restrictive of it. But they differ in the that the charter of Charles grants, for the first tim fines imposed by justices of peace, while it confines grant of fines to those imposed for offences committee within the city or its "suburbs," a less comprehensi term than that of "liberties" used in the former chart Liberties and suburbs are not to be tak Bolland B. as synonymous where both terms are used. Places ex

⁽a) 3 Bla. C. 39; 1 id. 33.

Buke's Place and part of the Thames, which are within the liberties though not the suburbs (a). Again, t excepts fines or issues royal imposed on the mayor and sheriffs; which must have been imposed in the TheMayorand courts at Westminster. The words at the end of the dause in the charter of Car. 1. "in the city aforesaid djudged or to be adjudged forfeited," must be read n connection with "other justices of him, his heirs, &c." But if its construction be doubtful, that circumstance manot deprive the clear words of the charter of Hen. 6. If their natural effect. Upon those words they rest heir claim, though it may be mentioned that by a Lause in the charter of Hen. 6. the mayor, recorder, heriffs, &c., to whom a certiorari is directed, are not compelled to certify or send the indictment, recognipance, or security of the peace, taken or found before hem, but may send only the tenors or transcripts hereof. Then, as in contemplation of law (b), the secord itself remains in the city, the judgment must be ken to be given there, though pronounced in the L. B. at Westminster on the transcript. The charter strong to show that the city might themselves enter p and execute the judgment. [Lord Lyndhurst C. B. becording to the argument for the crown, the attorsy-general, by removing the indictment by certiorari, **might have always** deprived the city of the fine. (c)

1834. The King υ. Inhabitants of the City of LONDON.

Wightman replied. The court of Common Pleas sald not impose the fines intended by the charter of 1.6. Its general words, "justices assigned to hold leas" &c., mean not the courts collectively, but the

⁽⁶⁾ See Jones v. Walker, Cowp. 624.

⁽b) See now 11 G. 4. & 1 W. 4. c. 70. s. 9., and Rex v. Faton, 2 T. R. 89.

⁽e) The modern practice is said to be to remove the record, and see Rex v. Schardson, 2 Leach, C. C. 560, on the city's right to retain the record. See lawh. P. C., b. 2. c. 25. s. 97. c. 27. s. 26.

in the city liberties might be adjudg justice of peace of the city.] [Lord L Besides the justices enumerated by th justices are named. The judges of court are not, as such, justices of peace a juryman, or for a contempt. Then charters are satisfied.]

Lord Lyndhurst C. B.—The true is granted by these charters? I see between them. The words of that of and general as far as respects the plac of the fine. The words "in the city suburbs thereof," apply to the treasure the charter of Charles, the words "in said" are to be read with "other just preceding, so as to restrict that gener justices "in the city." By that in charters entirely consist and are not a However, before giving judgment we curate copies of the clauses in question, the original Latin of the charters.

Pleas, which was stationary at Westminster, showed distinctly the intention of that charter, that all fines for misdemeanors committed within the city should pass to the citizens wheresoever they might be imposed by the courts mentioned. Taking the charter of Charles 1. by itself, the grant may appear to be more limited, but at all events, as that of Hen. 6. is not shown to have been surrendered, its comprehensive words will not be affected by the more limited but not inconsistent terms of the latter.

The King
v.
The Mayor and
Inhabitants of
the City of
London.

Judgment in favour of the claim of the city.

PERRY against PATCHETT.

A Rule had been obtained for setting aside the writ A stack of hay standing on the defendant's premises was sold by him to the defendant to buy a rick of hay, standing on the defendant in his occupation for 65l., and to cut and remove it by May. The plaintiff paid the defendant the 65l. In February the defendant's landlord having distreined on the defendant's landlord having distreined on the defendant's landlord distrementation.

Whateley showed cause. The Reg. Gen. of Hil. that the amount of debt and cost of Gen. Hil. Mich. 3 W. 4. No. V. [ante, Vol. III. p. 2,] is made applicable to all writs of summons, distringas, and detainer issued under the uniformity of process act 2 W. 4. c. 39. does not extend to actions for unliquidated damages. The plaintiff sues to recover back the money paid to the defendant, and also the right to keep plaintiff's damages, in losing the right to have the hay remain on the defendant's premises till May.

hay standing on the defendant's premises was sold by him to the plaintiff, who was to take it by away by a fixed day. Before the on time arrived, the defendant's landlord distreined it for rent. Held, that the amount of debt and costs as, the writ of summons, as the cause of action was for action was partly for the loss of the right to keep the hay on the ground.

CASES IN TRINITY TERM

1834. PERRY PATCHETT.

Richards in support of the rule. The action is substantially to recover a debt, viz. the value of the stack. But

Per Curiam.—This action is also brought to recover damages for the loss of a further benefit to which the plaintiff was entitled under the contract, viz. the use of the defendant's premises for the purpose of keeping the hay there. Those are unliquidated damages, which can only be ascertained by a jury. The rule, therefore, does not apply.

Rule discharged with costs as moved (a).

(2) See Tarling v. Baster, 6 B. & Cr. 360; Bunney v. Pounts, 4 B. & Adol. 568.

MARY WILLS, Executrix of W. WILLS, against Noor and Another.

A note for 200% with lawful interest reserved from a day prior to the date, reapplicable to a note for 2001. only.

SSUMPSIT on a promissory note in the following form :

" March 6th, 1827.

Two years after date we promise to pay H'm. Wills, quires a stamp or order, two hundred pounds, with lawful interest for the same, from the first day of February 1827, for value received.

> Thomas George Noott. Thomas Lane."

The note was drawn on a 5s. stamp, which was the proper one for a sum not exceeding 2001. payable more than two months after date. It was objected at the trial, that the reservation of interest prior to the date of the note, made the principal sum secured more than 200/., and that therefore the stamp should have been 66. instead of 56. Parke B. thought the stamp sufficient, and directed a verdict for the plaintiff, but gave leave to move to enter a nonsuit.

WILLS

V.

NOOTT

and Another.

Cripps now moved accordingly, and contended that this case did not fall within the decisions of Pruessing v. Ing(a), and Israelv. Benjamin (b), which only established that a note reserving interest from the date did not, by season of such reservation, require a higher stamp than was sufficient for the principal sum. In the former of those cases Abbott C. J. said, "The object of the legislature was to impose a pro rata" stamp duty upon the sum actually due at the time of the taking the security, and not upon what might become due in future for the use of the money. The question therefore is, What was the sum due at the time when the note was given? for that is the sum secured. In the other case Lord Ellenborough thought the stamp sufficient, "as there was no interest due when the bill was drawn." The reasons of the decisions in each case seem to be authorities in favour of the defendant. [Alderson B. are only obiter dicta.] Admitting them to be so, they are the best authorities in new cases, and applying this ease to C. J. Abbott's words in Pruessing v. Ing, it is impossible not to say that the principal sum secured a not only 2001., but the interest for thirty-five days besides, and the judgment of Lord Ellenborough in Israel v. Benjamin exactly meets the present. To hold this stamp sufficient would open a door to evade the usury laws. Thus a person might, on a note payable two years after date, reserve interest on his note from a day two years prior to its date, and thus obtain 10 per cent. If this be so, this note (if the interest prior to the date is not to be considered as principal) is void for

WILLS
v.
Nootr
and Another.

usury. [Parke B. referred to Dixon v. Cass (a), D v. Snaith (b), Deardon v. Binns (c), and said that t principle to be derived from these was, that the pri cipal sum mentioned in the security should be t measure of the stamp, and that any collateral and i definite matters could not be taken into account to i crease the stamp.] Id certum est quod certum reddi; test, and the amount of interest prior to the date is be calculable exactly. In Dixon v. Cass, the reservati of the amount of bankers' commission on a bond ! 1000l. made a higher stamp necessary than what wo have covered a bond for that amount only; that a seems to be in favour of the defendant here. In I v. Snaith there was nothing reserved which could I have been enforced without any such reservation; bill or note will carry interest from the time it become due, without any mention of it in the bill; but here t interest prior to the date could never have been 1 covered without express mention of it. and it m therefore be considered as a part of the principal st secured.

PARKE B.—I think that the 2001. only can be said be the sum secured by this note. The sound priciple is, that what is expressed to be the principal st secured, shall regulate the amount of the stamp. He 2001. is that sum, all the rest is interest.

ALDERSON and BOLLAND Bs. concurred.

Rule refused

(a) 1 B. & Adol. 348. (b) 8 Bing. 146. (c) 1 Mann. & R. 13

1834.

PHILLPOT against ASLETT.

TN 1831 the defendant owed the plaintiff 411. 5s., and Ifa discharged was discharged under the insolvent act 7 G.4. c. 57. insolvent gives a bill to a Having afterwards again dealt with the plaintiff, he creditor for gave him a bill for the balance then due. The old due, as well debt was not specifically included, but defendant on account of had made several payments on account for debts in- before as since curred since his discharge, and the 411.5s. formed in the discharge, he can only be fact part of the bill given. He did not defend an relieved from action brought against him on the bill, but gave a an action on the bill, but gave a the bill by warrant of attorney to enter up judgment for its amount pleading his and costs, which judgment was entered up accordingly. der the insol-A rule was obtained for setting aside the judgment, on ventact 7 G.4. the ground that by 7 G. 4. c. 57. s. 61. the defendant and if he give was not liable on the bill, it being in part given "for a warrant of the same debt or sum of money" for which he was enter up judgbefore liable. Cause was shown, in the first instance, amount of it that the defendant should have pleaded his discharge and costs, the to the action on the bill.

the balance . debts incurred discharge unc. 57. s. 61; · attorney to court will not set it aside on motion.

Per Curiam.—The bill was accepted by the defendant after his discharge under the insolvent act, for the balance due by him to the plaintiff, as well before as after that event. That bill having been sued on, the defendant had the opportunity to plead his discharge, but having given a warrant of attorney instead, he has lost the proper time and mode of relieving himself.

Rule discharged (a).

Platt supported, Tomlinson showed cause against the rule.

(a) See Evans v. Williams, ante, Vol. III. 226.



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J. Worts upon credit, for a

wit, the sum of 300%, the said

Averment, that the d

The first

SSUMPSIT.

Payment of money into court on a declaration in taining special and common counts founded on a variety of dealings between the be applied by any particular count only, but the defendant may so apply it to the damage therein stated to have been

Where payment into court was

charging him with having negligently sold plaintiff 's flour to an in in order to show the transaction in question to be the payment into court on the first count, gave lette plaintiff had admitted the sale in question to be hi by the defendant. The jury found a verdict for the not disturb it, on the ground that this evidence we

flour.

An authority to proceed in an action to recover a sanction opposing his discharge in the insolvent deb

the defendant for commission assumpsit conbehalf, to sell and dispose of plaintiff's of 300%, value, the plaintiff to be responsible to same. for 300l., but that although a parties, cannot ment hath long since elapsed the plaintiff to the same or any part there second count was on a promi money the goods should sell mission. incurred. ployed defendant for commis

made generally on a declaration containing one count charging care &c., but, on the contra the defendant for the produce and without due and proper of sales as factor on a del credere commission, and another

there in insolvent circumstances, and such said lastmentioned sum is still wholly unpaid to the said plaintiff, and the said J. Worts having since, to wit, on &c., taken the benefit of the act then in being for the relief of insolvent debtors, he the said plaintiff is likely to loose the last-mentioned sum. There were also counts for goods sold and delivered, for money had and received, and on an account stated. Pleas of non assumpsit, and set-off to the common counts, for work done and materials provided, journies and attendances, money paid, and for a balance due on an account stated. The particulars of the plaintiff's demand were for 164. 10s. alleged to be due on the balance of account for flour consigned by the plaintiff to the defendant as his agent or factor, between 10th September 1828, and 20th December 1829. The defendant, in his particulars of set-off, debited the plaintiff with 1101. 5s. for flour sold and delivered to Worts between 25th May and 25th August 1829, but which had become a bad debt; 91. 5s. 6d. for the plaintiff's share of expense of journies taken by the defendant in pursuit of Worts in order to recover the above debt, and 451. as cash paid for the plaintiff's proportion of a bill of costs incurred in attempting to recover the debt from Worts. Among a multiplicity of items of set-off, the above were those disputed by the plaintiff. A sum of 91. 5s. 6d. had been paid into court generally on the whole declaration. At the trial at the London sittings before Gurney B., it appeared that the plaintiff, a country miller, had entrusted the defendant, a flour factor in the neighbourhood of London, with flour to sell for him at a commission of sixpence per sack if sold to factors, and one shilling per sack if sold to bakers; but it was not shown that the defendant had guarantied the payment by the vendees, or charged or accepted a del credere commission for so doing. In August 1829, Worts, a DRAKE 0.

DRAKE v.
LEWIN.

baker, who had often previously bought the plaintiff's flour of the defendant and paid for it, owed 1101. 5 for the plaintiff's flour, and being supposed to be attempting to escape from his creditors by going to America, was pursued by the defendant and arrested for the debt. The action proceeded against Worth with the sanction of the plaintiff, till he applied for his discharge under the insolvent act. His discharge was opposed on behalf of the plaintiff among other creditors, but there was no evidence that the plaintiff had authorized such opposition. The share of the costs of the action and opposition debited to the plaintiff amounted to 451. The only evidence adduced by the plaintiff to establish his consignment of flour to the defendant consisted of three accounts current rendered by the defendant to the plaintiff, in which he stated himself to be the plaintiff's factor. The last item in the third and last account was as follows: "1831, March 17th. To balance paid by Mr. Drake's order to Barnett and Co., 201. 3s. 4d." Upon this, John Williams for the defendant objected that the plaintiff must be nonsuited, as the last account between the parties was balanced; and it appeared from the particulars that the balance of 201. 3s. 4d. had been paid by the defendant to the plaintiff's order. On this point the learned baron gave leave to the defendant to move to enter a nonsuit if the plaintiff should have a verdict. The defendant's counsel proceeded to prove his set-off, admitting that the balance was against him, unless he established the three items above mentioned. He contended, however, that the first count on a del credere commission was not proved. For the plaintiff, it was answered, that the special contracts alleged in the declaration were admitted by the payment of money into court generally. The defendant's counsel replied, that that payment into court admitted the plaintiff's demand only to the amount of.

DRAKE v. Lewin.

the sums paid in, and that as it appeared by the plaintiff's account that there had been sixteen transactions between the parties within the period fixed by the particular of demand, it was competent for the defendant to show that the first sum he claimed to set off for flour sold to Worts, was an exception to the course of dealing stated in the first count; and also to defend on every count as to all beyond the amount paid in. The learned baron hereupon admitted in evidence, on the part of the defendant, letters written by the plaintiff, showing that he treated Worts's debt as his own concern, and that he had no guarantie from the defendant for any sales he might effect, but refused evidence tendered to show that by the general usage of the trade there could be no such guarantie on the low terms stipulated; and assuming that the payment of money into court admitted the del credere contract - in the first count, he left it to the jury to say, whether the defendant's dealing with Worts formed a special exception to the general course of dealing between - plaintiff and defendant; and if the verdict should be for the defendant, gave leave to move to enter a verdict . for the plaintiff, on any one count, if the letters were improperly admitted. The jury found, that the defendant did not guarantie the payment of Worts's debt, and that the plaintiff had given the defendant a general authority to sue at law to recover from Worts the debt due from him, which authority was never withdrawn, and that there appeared a reasonable prospect of reap-. ing some benefit by opposing his discharge in the insolvent court.

In Easter term, Goulburn Serjt. for the plaintiff,
- obtained a rule nisi to set aside the verdict for the
defendant, and to enter a verdict for the plaintiff, either
for 1641. 10s. the whole amount sought to be recovered,
if the letters ought not to have been received in evi-

DRAKE v.

dence for the defendant, or for 451., the whole amount of the law charges. Subsequently Platt for the defendant obtained a conditional rule for leave to enter a nonsuit, in case the verdict of the jury for the defendant should be set aside. Both rules now came on for argument.

Platt and Swann for the defendant showed cause against the rule for entering a verdict for the plaintiff. The plaintiff's accounts showed a variety of transactions between him and the defendant, some of which may have been on a del credere commission, and others not. No contract for a del credere commission was proved, but if it had, it does not necessarily follow that that contract and authority applied to all the dealings between the parties, or that none took place between them on different terms. Unless the payment of money into court generally, without restriction to the common counts, admits every contract stated in every count, whether consistent with others so stated or not, and also a breach of it with damages on each count, exceeding the amount of the sum paid in, the defendant was not estopped from giving the plaintiff's letters in evidence to disprove his liability on the del credere commission alleged in the first count. The defendant contends that though such payment into court admits the special contract and damages accrued to the amount paid into court, it admits nothing more, and does not prove that all the transactions between the parties necessarily took place under that contract. Again, as the contract stated in every count is admitted, some of the money paid in must be taken to be due on each count, as it does not appear to be paid in on any particular one; but if ls. should be paid in generally on a declaration consisting of fifty counts, it could not be so applied to each. The defendant, when

1834. DRAKE 17. LEWIN.

e pays money into court, expressly contends that the reaches do not extend beyond the sum paid in (a). n the recent case of Bulwer v. Horne (b), where a exyment into court generally was held to admit conlusively that an action lies on every count of the delaration, the contract was an isolated one by the deandant, a carrier, to convey the plaintiff to a particular lace. Again, in Cox v. Brain (c), where there was a pacific bargain to pay a particular sum, the payment ato court of a smaller amount by admitting the barmin, admitted also the sum which was originally due. be per Curian in Stoveld v. Brewin (d). So in Yate v. **Villan** (e), where a payment into court on a promise by be defendant to carry goods for the plaintiff, was held p estop him from showing the actual contract to have seen, that he should not be answerable for goods lost a greater extent than the sum paid in, unless entered and paid for accordingly; the special counts on which mly the payment into court was made, were referable n that single promise only. [Parke B. Seaton v. **Renedict** (f), and **Meager** v. Smith (g), were cases in which this subject underwent much consideration (h). n Bulwer v. Horne there was but one contract to which the payment into court could possibly refer.] n Mellish v. Allautt (i), the declaration was on a policy of assurance, with counts for money paid, had and received, and on an account stated; and it was reld, that a payment into court generally only admitted be contract, but did not preclude the defendant from bisputing his further liability beyond that payment for

(f) 5 Bing. \$8.

⁽a) See Stoveld v. Browin, 2 B. & Ald. 118.

⁽b) 4 B. & Adol. 132; and see Rovenscroft v. Wise, post, 741, argued ome days after this case.

⁽e) 3 Taunt. 95. (d) 2 B. & Ald. 118.

⁽e) 2 East, 128. (g) 4 B. & Adol. 673.

⁽h) See Ravenscroft v. Wise, post, 741. (i) 2 M. & S. 106.

DRAKE
v.
LEWIN.

goods not loaded according to the terms of the policy In Stafford v. Clark (a), Best C. J. was of opinion that the payment of money into court on several general counts, one of which only is applicable to the plaintiff's demand, admits a cause of action on that count only. The same principle applies here, where of several special counts, only the fourth, viz. for goods sold under a commission, not of del credere, was proved. It is here sought to make the payment of money into court admit two contracts wholly inconsistent with each other, as stated in the first and fourth counts. mages could be recovered on the first which states a del credere commission. Everth v. Bell (b) was an action on a policy of insurance on fish, " free from average, unless general on the ship stranded." Money was paid into court generally on the whole declaration. dence having been given of some general average, the plaintiff, in order to entitle himself to recover for a total and also a partial loss from stranding, alleged by him, relied on the payment of money into court as an admission, as well of a total loss as of the loss by stranding: but it was held, that as the partial loss might, consistently with the declaration, accrue by another alleged cause, viz. as a general average, the plaintiff could not apply the payment of the court to the stranding exclusively: Gibbs C. J. adding, "the court will not be extremely cautious strictly to tie down the parties to the effect of a payment into court, when it is to prevent their trying their right." Cox v. Parry (c) was an action on a policy, in which the defendant had paid money into court generally, and had he not done so, the plaintiffs must have been nonsuited for illegality in the policy; and Ashurst J. in delivering the judgment of the court, said, as the defendant had paid

⁽a) 2 Bing. 377, 9 B. M. 724, 729. S. C.

⁽b) 7 Taunt. 450.

⁽c) 1 T. R. 465.

ey into court, he has thereby admitted that the stiffs are entitled to maintain their action on the cy to the amount of that sum. But he has aded nothing more. He does not, by paying money court, vary the construction and import of the cy, so as to entitle the plaintiffs to recover beyond extent." Long v. Greville (a) was assumpsit for ds sold and delivered, and on the common money its. Pleas, non-assumpsit, and the statute of limitate claim was for several dinners at an hotel, for small sums expended on account of the defend-

A sum had been paid into court generally. The t held that that payment had not the effect of exing the defendant from the benefit of the statute of ations, saying, "where money is paid in on a deation setting forth a special contract, that is aded as alleged; but in no case has the effect gone and admitting that the sum paid in is due. Here pecial contract was set out; the declaration only d that so much money was due. The payment court was equivalent to saying so much is due and nore. You cannot from such a negative imply an The plaintiff, therefore, with respect to rest of his demand, was in precisely the same situaas if that sum had not been paid in." In Stoveld v. win (a), the action was on a special contract, by the plaintiff had sold the defendant a quantity of bark, at the average price of the season, to be rtained before a given day. The declaration red, that before that day the average price was rtained to be a given sum, and the court said that nent of money into court generally on the whole aration, admitted only a cause of action on each it, and a breach with something due thereon, but

DRAKE v.
LEWIN.

⁽a) 3 B. & Cr. 10. (b) 2 B. & Ald. 116.

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DRAKE v. Lewin.

not the amount of the breach there stated; "for the defendant, when he pays the money into court, expression contends that the breach does not extend beyond the sum so paid in. Here the defendants have admittenthat an average was struck, but not the amount of the average."

Goulburn Serjt. for the plaintiff, (Curwood with him As no evidence was given of any authority by th plaintiff to expend money in opposing Worts's dicharge, the finding of the jury on that head cannot b supported.

As to the rest, the payment into court admits con clusively the existence of every contract as pleaded i every count, and the breach of it as there laid. The plain tiff proves damage to have been sustained beyond th amount paid in, and the defendant clearly shows by th accounts put in, and his particulars of set-off, that th 91. 5s. 6d. was paid in for the plaintiff's share of th expenses in pursuing Worts, and not to meet th breaches of contract laid in the first and fourth specis counts. The facts do not furnish sufficient premise for the defendant's argument, but in Bennett 1 Francis (a), Lord Alvanley, after canvassing Cor 1 Parry, Gutteridge v. Smith (b), and Ribbans 1 Crickett (c), as well as Lord Kenyon's opinion as es pressed in Baillie v. Cazalet (d), declared the opinio of the court of C. P. to be, that a payment into cou on the whole declaration is an admission of a contract on every count, in every transaction on which such

⁽a) 2 B. & P. 550 and 555.

⁽b) 2 H. Bla. 374, M. 1794, where Heath J. inclines to fix the originpayment into court about the beginning of the 18th century, when 4 & Ann, c. 16. s. 13. passed.

⁽c) 1 H. Bla. 264; see also Watkins v. Towers, 2 T. R. 275; Andrews v. Palgrave, 9 East, S25.

⁽d) 4 T. R. 579, H. 1792,

DRAKE v.
LEWIN.

contract can arise. The earlier cases are fully borne out by Bulwer v. Horne, which closely resembles this case, for there is here no count to which any separate or excepted transaction between the parties could apply. [Parke B. It is clear on the accounts, that the 91. 5s. 6d. was paid into court, not for money paid by the defendant for journies after Worts, but as a balance of sums received by the defendant on all his other transactions for the plaintiff, and due to the plaintiff after the first item of set-off, viz. 110l. 5s. for Worts's bad debt had been disposed of aliunde.] The amount due on each count is clearly disputable, and if the payment into court was made on account of a supposed balance, the plaintiff has shown a larger damage to have accrued on the first and fourth counts. By paying money into court the defendant has admitted that he guarantied Worts's debt, and the plaintiff has a right to apply the payment into court to that count or to the fourth, averring a negligent sale to Worts. Taking the case as if defendant had suffered judgment by default as to several counts, then on a writ of inquiry the plaintiff would be entitled to enter a verdict for flour furnished to Worts.

PARKE B.—This action is not brought on a particular contract, nor is it so confined even by the particulars of demand, but arose on a variety of transactions between the parties. The payment of money into court generally admits some contract on every count, but that only, and the plaintiff has no more right to apply such payment to one count than to another, for it applies generally. As to the first count, the defendant might say, I did not guarantie the plaintiff for the produce of the sale to Worts, and desire that so much of that claim may be struck out of the declaration. Nor is there any thing to estop him from applying the payment to the

Drake v.
Lewin.

damage incurred by the transaction in the first or of count. Then the difficulty arises, that it was ne made a question at the trial what amount of damage plaintiff had sustained, supposing the defendant to only responsible on the fourth count, viz. for a n ligent sale on credit to Worts, being an insolvent pers. The best course will be for the plaintiff to confine verdict to the balance of 201. 3s. 4d. on the count goods sold. As no evidence was given that the opposition to Worts's discharge by the insolvent court to place with plaintiff's sanction, he cannot be liabled the costs of that proceeding. The 91. 5s. 6d. paid it court must not be deducted from the 201. 3s. 4d.

ALDERSON B.—In Bulwer v. Horne no other effective could be given to the payment of money into court the its admitting the special contract. It does not appear to what specific goods the first count applied.

Goulburn Serjt. then showed cause against the rule for a nonsuit. The defendant had admitted the had received goods from the plaintiff, was bound take care of them, and had sold them to Worts, a insolvent. It was argued at the trial, that if this coushould think that the defendant was not authorized the plaintiff to oppose the insolvent's discharge, the plaintiff should be at liberty to enter a verdict for the expenses incurred in that opposition.

PARKE B.—Taking the case as it stood when it we closed for the plaintiff, there was a case to go to the jury for 201. 3s. 4d. which the account admitted to be due. Then how could he have been nonsuited without the defendant going into his whole case to prove the actual payment to Barnett & Co. by the plaintiffer order? But admitting that payment to be established.

by the particulars as contended, the payment into court was also in evidence, which admitted a damage by negligence in selling to Worts, and afforded a case to go to the jury, whether the damages accruing from the breach of contract admitted in the fourth count amounted to more than the sum paid in.

1834. Drake 27. LEWIN.

BOLLAND and GURNEY Bs. concurred.

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Rule for entering nonsuit discharged.

RAVENSCROPT against Wise and three Others.

TNDEBITATUS assumpsit for wages due from the A master of a defendants, who were owners of the brig Indian, to ship sued four defendthe plaintiff as captain of that ship, and on their re- ants in indebitainer. There were counts also for work and labour, sit, for wages money paid, &c. and on an account stated. Plea: gene- and money ral issue, with notice of set-off. Money was paid into paid money court by all the defendants on the whole declaration. At the trial At the trial at the Spring assizes for Cheshire before the plaintiff Bolland B. the plaintiff put in an agreement signed proved an agreement Anderson, Wise & Co., and proved it to be in the hand- written by W. writing of Wise, who was one of the defendants. the agreement, which was without date, the plaintiff signed A. W. & Co., by

By one of the defendants, which the

plaintiff was engaged as master of a ship for a voyage of three years certain, at yearly wages. He proved that he served accordingly, and then put in the rule to pay a sum into court not amounting to one year's wages. The defendants having objected that the plaintiff must be nonsuited for want of proving all the defendants to be liable, showed that one of them was neither a member of the firm of A. W: & 'Co., or an owner of the ship which the plaintiff commanded. They then produced the ship accounts rendered to them by the plaintiff, in which they sought to set off against his demand the items with which he had credited them, and to provett him from recovering against them as for money paid on account of the ship, certain medical and other disbursements there charged to the ship. Held, that under the circumstances, the whole demand of the plaintiff, though consisting of distinct items, was referable to one contract, and that consequently payment of money into court by the four defendants being referable to that con-- tract only, admitted it to be made by the four defendants, so as to hinder them from setting up as a defence, that one of them was not a party to it.

RAVENSCROUT
v.
WISE
and Others.

was to command the brig Indian, for a voyage of the years certain, at the yearly wages of 100l. with cer allowances. It was proved that he commanded ship on the voyage in question, and had comman her several years before; on returning home he dismissed by a letter from Wise, Anderson & Co., w was produced A rule for payment of 611. into c by the four individuals sued, (viz. Wise, Anderson, I Wylie and S. Wylie,) was next proved. contended, that the plaintiff must be nonsuited want of identifying as partners, the four per sought to be made jointly liable as such; and the rule for payment of money into court on co in indebitatus assumpsit was not even prima f evidence of that liability, or of more than ad ting the sum paid in to be due and owing. the plaintiff it was answered, that the payment court could only apply to the single contract pro-The learned baron having given leave to move to e a nonsuit on that point, the defendants proved neither at the time the contract was made or afterwa was the defendant D. S. Wylie a partner, and the had ceased to be a registered owner of the ship be the plaintiff first commanded her. A verdict was t taken for the plaintiff, subject to a reference of items of the set-off, which were the disbursem made by the plaintiff on account of the ship Inc during a long trading voyage stated in his accou which also acknowledged sums as due to the defends

A rule having been obtained according to the k reserved,

Crompton and Lloyd showed cause. The fact the four defendants have paid money into court, count charging them as jointly liable to the plaintiff wages, as master of a ship on their retainer, con sively proved their liability to this plaintiff under s

retainer, particularly when coupled with that of the plaintiffs' service in that ship, under an agreement written by Wise, in the name of Anderson, Wise & Co. Seaton v. Benedict (a) will be cited to show that in the abstract, payment of money into court on a count in general indebitatus assumpsit does not admit a contract beyond the amount of the sum paid in. the subsequent case of Walker v. Rawson (b), is more in point with the present. There the work sued for having been all done under one contract, the defence was, that the contract was made with plaintiff, and also with one Burgess, who did not sue. For the plaintiff it was answered, that the payment of money into court was an admission of his being liable to the plaintiff on the record, and Seaton v. Benedict was cited; but Tindal C. J. said, "The present case is different from that cited. There the action was but to recover the price of goods supplied to the defendant's wife; each article might there be treated as the subject of a separate contract, and the payment of money might therefore admit a liability as to some articles and leave others disputed. But here, if the defendant is liable in respect of any of the work done, he is liable in respect of the whole of the work, for the contract was one. and the only question is, whether it was made with the plaintiff alone, or with the plaintiff and Burgess jointly. Now the defendant being sued by the plaintiff alone pays money into court, and thereby admits that he is content to treat the contract as made with the plaintiff only. Therefore I shall certainly not nonsuit the plaintiff, but will give leave to the defendant to move." No motion, however, was afterwards made. case too many persons are made defendants, while in Walker v. Rawson, a party who ought to have been

RAVENSCROFT
v.
Wise
and Others.

⁽a) 5 Biug. 28.

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RAVENSCROFT
v.
Wise
and Others.

made a plaintiff was not included as such. In princi they do not differ. The true rule is, that payment money into court is conclusive evidence of every th that would have been necessary for the plaintiff prove in order to recover the sum paid in; and in a c like the present of a single contract, to which alone payment into court can be referred, . it has the effect admitting that contract, whether the declaration be form in indebitatus assumpsit or not. This was a c of a single contract, the question being, what su were to be allowed the plaintiff as captain, and wl the defendants were entitled to strike out of accounts. [Lord Lyndhurst C. IL I understand t effect of payment of money into court to be, that it or admits a certain sum to be due by the defendant to t plaintiff, on the contract set out by him. but one contract it must apply to that. Here all t charges were made and all the duties and expenditu arose out of one contract.] Though passages are be found in modern cases in which the effect of pa ment into court on an indebitatus count is spoken as different from a like payment on a count on a spec contract, they all occur in cases where the allegation contract in the count has appeared on the evidence be not entire, but divisible. Either state of things consistent with the form of indebitatus counts, and it appear in evidence that different items are sued i under different contracts, payment into court as some will not admit the rest; but if the cause of acti is shown to have arisen under one entire contract on the payment of money into court admits it conclusive Bulwer v. Horne (a); though the circumstances of case may be considered to see whether there is or one entire contract, or whether it is divisible, Meas v. Smith (b). In Seaton v. Benedict (c), it appeared

(a) 4 P. & Adol. 132. (b) 4 B. & Adol. 673. (c) 5 Bing. 28

evidence, that some of the goods supplied were suitable to the condition of the defendant's wife and others not. It would have been most unjust if payment of money into court by the defendant, for the articles for which he was liable, had compelled him to pay for those for which his wife, as his agent, had not authority to bind him. Long v. Greville (a) is also an instance where the allegation in the count was divisible, as one part of the demand under the general count might be barred by the statute of limitations, and the other not. Here the court called on

RAVENSCROFT

v.

Wise
and Others.

John Evans and J. Jervis to support the rule. the plaintiff must have been nonsuited had no payment into court taken place, it will follow from the argument on the other side, that if, in an action against several for work and labour and money paid, any sum is paid into court by the attorney for all the defendants, proof of a contract with one will fix the rest who never contracted. But the effect of payment of money into court is only to acknowledge the plaintiff's right of action to the extent of the sum brought in, and does not preclude the defendant from an objection to the surplus part of the demand to which the payment does not apply. The form of the rule shows that when money is brought into court, unless the plaintiff will accept it with costs in discharge of the suit, it is to be struck out of the declaration, Stoddart v. Johnson (b); to which Tidd (c) adds, that it is also considered as paid before action brought, and so struck out. Had the sum paid in been struck out of the declaration, the plaintiff must have proved more to have been due from all the defendants. In Meager v. Smith (d), Parke J., after saying there is no doubt that payment of money into

⁽a) 3 B. & Cr. 10.

⁽b) 3 T. R. 657. Per Buller J.

⁽c) 9th ed. 621.

⁽d) 4 B. & Adol. 673.

RAVENSCROFT

v.
Wise
and Others.

court made on a count alleging a special contract, operates as an admission of that contract, proceeds: "If on a general indebitatus count for work and labour, on the like, for which the plaintiff might recover on one or more distinct contracts, it operates as an admission of a liability to that amount on some one or more of such contracts; its effect in both cases is the some as if a payment had been made by the defendant to the plaintiff of the like sam before action brought." That would certainly only conclude the party to that amount. In Mellish v. Allnutt (a) it was held, that payment of money into court generally upon a declaration containing a count on a policy of assurance and the money counts, is only an admission of the contract, but does not preclude the defendant from disputing his liability beyond such payment for goods not loaded according to the terms of the policy. [Lord Lyndkurst C.B. The difference between a payment to a plaintiff before action brought and a payment into court, is, that while the first is only prima facie evidence, the latter is conclusive.] In Blackburn v. Scholes and another (b), 51. was paid into court in an action of indebitatus assumpsit, for goods sold and delivered. Before any payment into court the particular of demand had stated, that the action was brought for the price of ninety-four bags of cotton wool, sold for the plaintiff to the defendants by K. & Son on a day named. was proved that on that day K. & Son sold such a quantity of goods to the defendants in one lot. being objected that the plaintiff's property in the goods must be shown, the plaintiff's counsel contended that it was admitted by the payment of money into court; and it was said, that the goods were all sold at one time, and that the defendants could not, after paying

money into court, dispute the property being in the plaintiff. For the defendant the distinction between such a payment on a special and a general count was taken, and Lord Ellenborough held that the plaintiff was bound to prove the goods to be his property. Then the defendant may on the general count show a complete answer to the action, notwithstanding the payment of money into court. Lord Lyndhurst C. B. In that case K. & Son, the brokers, sold the lot of goods in their own names, and as it did not follow that all which they sold in that lot was the property of the same person, their payment of money into court did not sidmst the plaintiff to be the owner of the whole.] The defendants' contention at the trial was not against the plaintiff's wages, which were allowed and settled on account, but that he as captain dught not to be allowed in account with his owners for various items of disbursements, during a very long voyage, for medical aid to the seamen, and for some other matters. Now as the defendants might be liable for some and not for others, they had a right to dispute the lafter. [Lord Lyndhurst'C. B. The payment of money into court generally is divisible, as it may be made on many different contracts. Here the plaintiff was captain of a ship on a long voyage, during which he paid the ciew, and made disbursements on account of the ship, which happened to arise from his duties as captain under his agreement with the defendants; all his payments are referable to that contract, and to his duty Hesulting from it. If they were not made on that contract, he could not recover against any of the parties. Suppose's man whom I employ to do work splits his demand into a hundred items, they are all included under the single contract with me, though, with regard to the persons he may employ, his disbursements may The distinction appears to me to be

RAVERDORDET

v.

Wise
and Others.

1834.

RAVENSCROFT

v.

Wise
and Others.

obvious, and to have been made at the trial. Payment of money into court does not admit the defendants' general liability in every way. It admits, their general liability on or in respect of this contract on which the disbursements were made. Alderson B. It admits that the sum paid in is rightfully, in the declaration at the time, it is made, on account of some contract between the parties; now there being here but one, it can only be referred to that,]... That is treating the case as if a special contract was declared on, whereas the contract proved related, merely to the plaintiff's services as captain, and not to any expenditure by him as such. [Lord Lyndhwest C. B. If I hire, a man as captain of my ship without saying more, it becomes part of my contract to pay him all the money he shall as such properly lay out on my account.] . In Long x. Greville (a), payment into court was held not to shut out a special defence under the statute of limitations, the court saying "Here, no special contract is set out The declaration only stated that so much money was due. The payment into court was equivalent to saying so much is due and no more." [Lord Lyndhurst C. B. In that case there were several contracts. The original contract of retainen here binds the whole disburgements together, and shows the contract, to be single. The question here is, whether any of the defendants was bound to pay under this contract? for, if, one was, all were, all having paid money, into court; and none being bound by any thing if not referable to this agreement. Possibly none of them may be bound, by, it. The agreement is for all proper disbursements in his duty as captain; the question of their propriety or the reverse is on the merits.] In Meager, v. Smith (b), the con-

⁽a) 3 B. & Cr. 19. Indebitatus assumpsit for goods add and delivered, with the money counts.

⁽b) 4 B. & Adol. 673.

tract for repairs was single, but the court thought the defendant not concluded as to his total liability by a general payment of money into court on a declaration consisting of indebitatus counts only. [Lord Lyndhurst C. B. By employing the same attorney and defending jointly by him, all the defendants, including D.S. Wylie, joined in paying the money into court. His defence now is, that he is not liable, and had he severed in his defence from his ed-defendants they could not have paid in the money (a).] They also cited the judgment of Askeret J. in Cox v. Parry (b).

RAVENSCROFT

v.

WISE
and Others.

Lord Lyndmuner having left the court,

BOLLAND B. stated the facts, and then proceeded thus: This is a motion to enter a nonsuit. For the defendants it is objected, that payment of money into court on an indebitatus count, does not bind the defendants further than the amount of the money so paid in, and therefore does not show them to be liable to the plaintiff, otherwise than on such a contract as he shall establish by other proof at the trial. It appeared to me at the trial, as it does now, that this was one entire contract made between the defendants as owners on the one side, and the plaintiff as captain on the other, for a long voyage. There is no item in the plaintiff's demand which does not appertain to the duty to be performed by him as captain, viz. for wages due to him as such, and for disbursements alleged to be made by him in the same character during the voyage, on account of the ship and for her sick crew. The only question in contest at the trial was, whether the owners were liable to pay those disbursements, or whether the captain had not, by making them impro-

⁽a) See Kay v. Panchiman and others, 2 W. Bla. 1029.

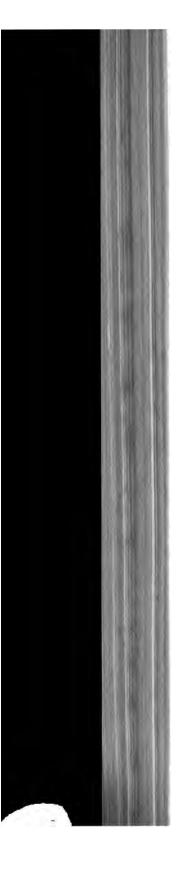
⁽b) 1 T. R. 465.



vidently, deprived himself of for repayment. The whole ferable to one contract, an court, the defendants have a to it. The present rule mus

ALDERSON B.... Directly i there was in fact but one co the payment of money into plaintiff was entitled to reco ants as parties to that cont the plaintiff in the same situs as if he had stated the contr ration, and had averred the done and money paid by him centract would have been ad court, leaving it open to t whether more was due unde The answer of the jury to Meager v. Smith, is not to b which their verdict proceed an authority in favour of the

GURNEY B.—The case s defendants, that they were consistent with their previou court.



1834.

ALIVON and Another, Provisional Syndics of the Estate and Effects of BEUVAIN a Bankrupt, against FURNIVAL.

DEBT. The third count of the declaration stated, On A. and B. that before Peter Beuvain became a bankrupt, to entering into an agreement wit, on &c., in parts beyond the seas, to wit, at &c., by in France, a a certain instrument in writing then and there made deposited by between the defendant of the one part, and the said A with a no-P. Bewain of the other part, the said parties made In an action and concluded a certain agreement; and in the same against B. on the agreement, instrument it was agreed between the said parties, that evidence was

tary at Paris. given, that by

the usage of France, a document deposited with a notary cannot be removed: Held, that the agreement was sufficiently proved, by production of a copy of the document so deposited; there being no satisfactory evidence of the fact, that two

duplicate originals had been made.

By agreement between A. and B. made in France, any disputes which might arise between them, were to be submitted by them to two arbitrators, merchants, [negotients] respectively named by them, who in case of disagreement were to have power to name an umpire. The two or the three referees night also be named by a particular court, at the request of either party :- Held, that that court might appoint an arbitrator, who was not a merchant; and also, that an act by which it annulled B.'s nomination of an arbitrator, on the ground that he was a foreigner, and appointed not two other arbitrators, but one, a Frenchman and not a merchant, to act as referee with the nominee of A., must be taken to be legal according to

the French law, till the contrary was distinctly proved.

Where on breach of an agreement entered into in France, and to be performed there, French arbitrators awarded a sum, including the profits which the plaintiff would have made had the agreement been fulfilled:—Held, that that sum might be recovered in an action here on the award, as not being shown to be con-

trary to French law.

It was deposed, that two out of three provisional syndics may, by the law of Prence, sue to recover debts due to the bankrupt, and without the previous authosity of the Juge Commissaire:—Held, that they may so sue in this country, unless the French law be shown to the contrary:—Held also, that the act of the two syndics sufficiently implied the absence or want of consent of the third, without showing his absence or want of consent.

Evidence was given, that by French law two out of three provisional syndics may sue for the debts due to the bankrupt, and no contradiction being offered:—Held,

that they may so sue in this country.

The declaration averred, that a party, a Frenchman, was a bankrupt. The evidence was, that he was only "en etat de faillite" or insolvent:—Held no variance, as the English "bankrupt" does not appear identical with the French "banqueroute."

ALIVON and Another v.

in case of disputes the parties recognized the jurisdic tion of a certain court, to wit, of the tribunal of commerce sitting at Paris, in the department of the Seine; and they thereby submitted the matters, in difference to the decision of two arbitrators, being, merchants, to be named by the parties respectively, such arbitrators in case of disagreement, to have the power of naming an umpire; and that the two or the three arbitrators might be named by the tribunal of commerce at the request of either of the said parties; and that the decision of such arbitrators or their umpire, was to be supreme, and without appeal. And the plaintiffs in fact say, that after the making of the same, instrument and before the said P. Benvain became a bankrupt to wit, on &c., at &c., such disputes as were mentioned and contemplated in and by the same instrument, agose and were depending between the said P. Beuvain and the defendant. And thereupon afterwards, and before the said P. Beuvain became a bankrupt, to wit, on &c., at &c., the said P. Beuvain duly, according to the laws of France, impleaded the said defendant in the said court in the same instrument in that behalf mentioned, that is to say, in the tribunal of commerce, in the department of the Seine, and then and there duly according to the laws of France, prayed and required that arbitrators should be appointed by the said court in pursuance of and according to the provision so aforesaid contained in the same instrument. the plaintiffs in fact further say, that afterwards, an before the said P. Beuvain became bankrupt, to on &c., parties were duly, according to the France, appointed in and by the said last-menti court, to decide the said dispute, as by the said pointment duly according to the laws of Errance, the course and practice of the same court, and still

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remaining therein, will more fully appear. And the plaintiffs further say, that afterwards and before the said P. Beuvain became a bankrupt, to wit, on &c. at &c. the said arbitrators having heard the allegations and proofs of the said parties respectively, duly made their certain award, called an arbitral sentence, of and concerning the said disputes so referred to them as aforesaid; and did thereby award and order, that the defendant should pay to the said P. Beuvain two several sums of foreign money, to wit, the sum of **51.589** francs, 50 centimes, and the sum of 157,819 francs, 68 centimes, making together the sum of 209,409 francs, 18 centimes, as by the same arbitral sentence duly, according to the law of France, and the course and practice of the said court, now remaining in the same court, will more fully appear. afterwards and before the said P. Beuvain became a bankrupt, to wit, on &c., by a certain ordinance duly, according to the law of France, made at Paris aforesaid, to wit, at &c., the president of a certain court in the kingdom of France aforesaid, to wit, the president of the civil tribunal of first instance, in the department of the Seine, further declared and ordered, that the same arbitral sentence should be executed in all its particulars, according to its form and contents, as by the same ordinance duly, according to the law of France, and the course and practice of the last-mentioned court, registered in the same court, and now remaining therein, will more fully appear. And that the said P. Beuvain, after the giving and making of the same judgment and arbitral sentence and ordinance, and before the giving and registering of a certain judgment hereinafter mentioned, to wit, on &c. at &c. became and was a bankrupt according to the laws of France, and the said plaintiffs were then and there duly appointed, and then and there became and were

ALIVON and Another v. FURNIVAL.

ALLVON and Another v.

and still are previsional syndies of the estate and effects of the said P. Benvain, according to the in of France. Whereupon and whereby the plaintiffs, at such provisional syndics as aforesaid, according to the law of France, became and were, and still are entitled and empowered in their own names to sue for and recover all debts which were due to the said P. Bo vain, at the time the said P. Bernain became harkrupt; and entitled to enforce by action in their our names, as such provisional syndies as aforesaid, claims and demands which the said P. Bouncip, at the time he so became bankrupt as aforesaid, had or might have against the defendant. And that the said court was afterwards, to wit, on &c., removed by the defentant into a certain other court in the kingdom of France aforesaid, to wit, a certain court called the Royal Court of Paris, by way of appeal; and such propeedings were thereupon afterwards had in the said last-mentioned court, that by the judgment of the same court, pronounced on the day and year aforemid, after setting forth therein as the fact was, that the plaintiffs, as such provisional syndics as aforesaid, had been made parties in the said cause in the room of the said P. Benvain; the appeal of the defendant was dismissed, and the defendant was condemned to pay a fine, and the expenses of the appeal, as by the same judgment duly, according to the law of France, and the course and practice of the said last-mentioned court, still remaining therein, will more fully appear. Which several judgments, arbitral sentence, and ordinance, still remain in their full force and effect, not in anywise reversed, annulled, set aside, paid off, satisfied or discharged. And the plaintiffs further say, that the said sum of 209,409 francs, 18 centimes, at the time of the giving and making the said several indements, arbitral sentence, and ordinance, was and still

is bf great value, to wit, of the value of 8,200%. Of

1834.

ALIVOR

and Another

FURNIYAL.

which haid swent premises respectively, the defendant, during the time aforesaid, there had notice: Yet &c. "Pies: nil debet. 1. All Commission lissued for the examination of with neither was executed at Paris. The original agreement in the French language, deposited with a notary, will broduced before the commissioners, and the sigmilitares of Beautin and the defendant were proved by Albert the attesting witness, who stated in the course of his examination, that according to the law of France, all mothry with whom an original agreement has been debbeited; cannot part with it, except by the directions of wife entities). The agreement was expressed to be " fait an double." An examined copy, verified by the same witness, was returned by the commissibilers." A copy of the original award, subscribed by the arbitrators, was proved by the persons who had examined it with the original, (which it appeared was descrited in the "Tribunal de premiere instance,") and also returned by the commissioners; and evidence was given of the fact, that Beuvein was a merchant, that he was in debt, and that he had stopped paymatch ((6) or it is - The cause was tried before Mr. Baron Vougham, at the Middlesen sittings after Trinity term 1833; the depositions taken under the commission, and the bapersite therewith, were read. Official copies versed by the seals impressed thereon, and proved to be those of the respective courts, were put in, to show

the judgment of the tribunal of commerce appointing

schiriferse named by the parties: another judgment of tail 1, 202 position in pour on se descisir d'aucune minute, si ce n'est dans les cas prévus par la loi, et en vertu d'un jugement." Loi du 25 ventione in 11. Sur le Notatiat, tit. 1, sec. 2, pl. 22. Appendice aux Coffes.

⁽⁶⁾ Bee Code do Commerce, Art. 437.

Alivon and Another v.

that court, removing the arbitrator named by Furnical on the ground that he was a foreigner, and appointing on Furnival's default, a new arbitrator; a judgmen of the royal court, confirming on appeal the late judgment; another judgment of the tribunal of the merce, extending the time for making the sward; another judgment of the royal court, confirming the latter judgment on appeal, and further extending the time, the ordinance; another judgment of the wibund of commerce, declaring Beuvain to: be Hom etable faillite;" another judgment of the same court, appointing the plaintiffs, and one Chatouner, provisional symdics, with power "agir ensemble ou séparément, in en cas d'empêchement, ou d'absence de l'autre, sous la surveillance de M. le Juge commissaire;" and another judgment of the royal court, confirming the ordinance, on appeal to which the plaintiffs and Chatownay were therein expressed to be made parties as provisional syndics, in the place of Benvain. The state of the s

M. Colin, a French advocate, examined for the plaintiffs, stated, that according to the law and: practice in France, one or two of three named syndics: may see without proving the disability of the rest; or the unthority of the juge commissaire, and deposed to the usage in France on various points of evidence. A French notary, who was examined for the defendant, stated, that syndics could not bring an action unless authorized by the juge commissaire, and said he did not suppose that a solicitor in France would bring an action for syndics, unless the authority of the juge commissaire had been obtained.

The defendant's counsel took a great variety of objections, the nature of which will appear in the course of the argument. The plaintiffs were non-suited. A rule nisi having been obtained, pursuant to

leave reserved at the trial, to set uside the nonsmit, and enter a wordlet for the plaintiffs for \$,2001 more after a month?

ALIVON and Apother v,

Fallett and Ibmlinson showed cause.—First, this is an action on an award, but the agreement on which the award is founded, has not been sufficiently proved. The plaintiffs have offered as evidence a copy deposited with the notary; but he should have attended the trial with the duplicate original. For the agreement is expressed to be "fait en double", and the Code Civile, Art. 1325, invalidates nots containing agreements, except the number of originals made is equal to that of the parties who have distinct interests; but the plaintiffs have neither accounted for Bewein's duplicate original, nor given the defendant notice to produce his.

Secondly, the award cannot be enforced, the arbitrators not having been duly appointed. By article 12 of the agreement (a), they were to be merchants, respectively nominated by the parties. The arbitrator nominated by the defendant was a merchant, but was set aside by the Tribunal de Commerce, who appointed another in his place, to act with the arbitrator named by Bezvain. There was no evidence, that by the law of France; the Tribunal had power to set aside the defendant's nominee because he was a foreign merachant, and unless it had the award cannot be enforced here. [Parké B. Though it does not appear on what principle the Cour Royale confirmed the award on appear on what

(a) Article 12 was as follows:—" En cas de discussions, les parties reconnaissent la jurisdiction du tribunal de commerce séant à Parls, Département de la Seine, et elles seront soumisos à donx arbitres négts [negotiants] respectivement nommés par elles, qui, en cas de désacord, auront la faculté, de nommer un troisième pour les départager; les deux ou les trois arbitres pourront également être nommés par le dit Tribunal de Commerce, à la requisition de l'une des partries; et la décision d'accord où celle du partige sera souveraine et sans recours en appel."

ALTOS and Another E.
FERRIVAL.

peal, their judgment is itself evidence, that by the li of France the award was right. The decision and appear was in favour of the judgment of the Tribu de Courseres, but did not decide at all on their tight annul the defendant's appointment of an arbitratit, to appoint another on their own authority. The act annulment itself is no evidence of their courts' authori to do so. The indements of Lord Penterden and the other judges, in Henley v. Super (a), show that white an award is disturbed by a court, which directs a me investigation, the consent of the party to a second w ference must be shown. Here no such contest at pears, and the arbitrator substituted by the court wi not a merchant. The Tribunal has neither exercise its powers of appointing both arbitrators, or follows the nomination made by the parties. It professes appoint an arbitrator for the defendant under the agreement, and not pursuant to the law of France. The award was made by Benrain's nominee, and another who was proved not to be a merchant, nominated by the Tribural, without the defendant's consent.

Thirdly. The award is bad, as the arbitrators have exceeded their authority, in awarding to Benezia at only the exclusive use of the patent in question throughout all France, but also to pay 157,819 france 68 centimes, a sum the result of calculating the expected profits for 15 years; nothing in the agreement authorizes that. The judgment of the Cour Royale affirming the award, did not decide the question whether per se the award was valid or not by the law of France. It affords only prima facie evidence of that question, which is still open to dispute on the merits. [Parke B. The decision in Martin v. Ni colls (b), was well considered.] That was an application for the extraordinary aid of the court of Chancery.

to immeach the judgment of a court at Antiqua and it who observed that the parties might appeal to the king in council, :: Eyne, C., J. in Philips v. Hunter (a), there refriged to by the vice-chancellor, said, the judgments of fencian courts might be examined. In this case the Errock courts have not adjudicated on the merits at all. The ordinance merely renders the award executory (b). and is merely formal. Like the making an agreement of reference is rule of court, for the purpose of issuing an attachment, it does not exclude objections to the award itself, The judgment of the Cour Royale rejects the sepend, from the ordinance, expressly on the ground that the questions raised on the award are matters of and therefore not the subject-matter of enterly. The Cour Royale does not affirm the validity of the award by the French law; nor is evidence mitten; that the arbitrators decided consistently with Bruck law, while their award appears contrary to all neteral justice,

responsibly. It has not been proved that the plaintiffs, who are described as "provisional syndics," and by their appaintment are to act "sous la surveillance de Ma la Juge commissaire," had his authority to are, without, which, by the law of France, they could not sugain French courts to recover a debt (c). The evidence, of Ma Colin does not distinctly disprove the necessity for proving that authority to sue in these cases in France, and is inconsistent with the language of the appointment and of the law, besides being contradicted by the desendants witness, M. Gerard. These v. Mars (d) is an authority to show that the plaintiffs should have shown their right to sue by the law of France. Were that otherwise, defendants might

ALIVON and Apother FURNIVAL

⁽a) 2 H. Bls. 402, 410.

⁽b) Code de Procedure Civile, Arts. 1020, 1021.

⁽c) Code de Commerce, Arts. 482, 492, 431:

⁽d) 8 B. & Cr. 638.



ba, put to kireat expenses why being usuals in this country without chienerounds and The action is a becombibly two autique d'anidere de anidere le soit en la contra de contra de la contra del la contra true they were linkerms temperatured at an actiff ensemble ou séparément, l'un en cas d'empêchement ou d'absence da L'autre. L'hut at dvidence was geven jos the quette graipograsity of the myndicinat julided. of Health to been absentgormingapable, shemactions should have been hygught in his name and on this belial firms well us there of the 19ther who the present illicity die 111 Alderson Bi In Trumpay will Kigmich (a), at was held about the court of GaR in the trade on the indemendent and drim Ehmes of and pench ibility is general in this many and the finderes sues the accepton in this country, he cannot proceed in his own name white should lead in that af the indurent according to the abrench Code de Columniana varioles 136, 137, 138, his So by oundbry all the assigneds of a bankrupu mustijain imanishtionishulus ancherdans by two out of three is not a due exercise of a pewerest act jointly, or, separately (the and these plaintiffichate not pursuall the power girlin them in terms uby their apevol of the rights which a purports to conferenting

Eifthly, The evidence sloes not support the diclaration. The arbitral sentence is stated in this declaration to be in the court, of commerce and the twidence is howe that it is, registered in the count of fast instance. The declaration, throughout describes. Benevinan a bankrupt, and the alleged rights of the plaintiffs are therein expressly founded, on this bankruptcy. In the event of a merchant, stopping payment, the French law (d) defines three classes of cases, with various incidents peculiar ito each, pamely "faillite," "banqueroute

⁽a) 1 Bing. New Cas. 151.

⁽b) See Snelgrage v Hunt, 2 Stark. C. N. P. 424. N. B. The report of S. C. in 1 Chit. R. 71. states the pleadings, which show the action to have been brought exclusively on a contract made with the "assignees."

⁽c) Co. Lit. 181 b.

⁽d) Code de Commerce, Arts. 437, 438, 439.

rimples and M banqueroute fraudulesser 300 Die French proceedings interidence show that there was no bunksupicy. be wither kindly but merely will faillite "land that River were they would stopped a doncer were some and some ou separément. Fun en eas d'empschement ou d'absence 20 Bedpad Sevito Manning and U. Henderson in supl portiof. this thie. In This tist in substance any weight on a insignental Itiappears from the Frenchaproceedings that Bartisia and the defendant were partners in the transactions but of which these differences grew and; according to the Etterch law (a) those differences could be decided and publications of the power of appeal persented by the defendant (b) war exercised by him, and bis cappeal cuan dejected of The cording nos redders the athitral is sentence in absolutely | executory (6), and unless successfully appealed from, conclusive (d) It's plain then that the defendant was absolutely bound in Estrace by this arbitral judgment; and there being the questions as to: inriadiction, no evidence on the part of the defendant impagaint that judgeletar and no irregut landy respharent next facie; it affords per set sufficient proof of the rights which it purports to conferming The plaintiffs' odseconowever, may be sustained without ascribing to the award and ordinance the attributes of a.judgmentalinThe production and proof of the original agreement before the commissioners, compled with the copy given in evidence, afford sufficient establishment of the agreement. It appears that the original is beyond the control of this court, and that it was deposited with the notary for safe custody; and one of the witnesses deposes, that according to the French law it cannot be removed out of the notary's office without the authority of a French court. It is therefore sufficiently manifest that this original could not be produced before

ALIVOR SIIO Afrother V.

⁽a) Code de Commerce, Art. 51. (b) Id. Art. 52.

⁽c) Id. Art. 61. (d) Code de Procedure Civile, 1016.

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ALLYON and Another v. Furnival,

the jury. The expression is intraced and described agreement, is not explained in evidence, and does not necessarily raise the inference attempted to a drawn from it, that these was another particles were drawn, it is at least not to be further pressured that an complete original (and the case supposes only two) we delicated to either of the parties who, mere mutually bound; and the only other presumption, visualist fremsined with the notary, answers the objection by accounting for the other part, and the proof of either part in each case is sufficient.

By the terms of the agreement the parties expressly submitted themselves to the jurisdiction: of the court of commence, and the judgment of that court, which we confirmed on appeal, is sufficient, in the absence at last of any evidence impugning it, to conclude the objection that the arbitrater nominated by the defendant was improperly removed. A sufficient reason in remissed in the judgment for the removal, viz. that the arbitrates nominated by the defendant was not legally qualified to be an "arbitre juge," being a foreigner up The defendant not having within the appointed time nominated another arbitrator, the court exercised its never as if he had never appointed an arbitrator. ... And the power was substantially as well exercised, by, nominating the arbitrator chosen by Bennain, and a new arbitrates on defendant's default, as it would have been by nominating two new arbitrators.

It is not clearly shown in evidence whether the arbitrator nominated by the court was a merchant, but assuming that he was not, still as the award has been confirmed on appeal, when this objection might have been taken, it must now be presumed, as there is me proof to the contrary, that the court did not in this respect exceed its power. On the agreement it does

tact uppear that the restriction of choice to merchants imposed the parties extends to the court of the does not more south and a minimum of the appropriate I be confirmation of the award on appeal sufficiently shows that the award itself is comistent with French law, until there is no evidence to the contrary. ... The award itself is consistent with natural justice: deltais Modless to inquire as to that part which awards to Between the exclusive use of the patent, because the Efected section is not founded on that party and even if the award were bad pro tanto, it might be good for the The award of the 51,589 francs, 50 centimes, is founded on proof of an excess to that amount of the expenses over the amount which the defendant by the agreement guarantied to be the maximum, and that item has never been questioned. With respect to the item of 157,809 france, 68 centimes, the arbitrators, in swarding it, have construed the agreement as imputing a guarantic that the profits of the undertaking should amount at the least to a certain sum annually during the duration of the agreement, viz. 15 years, and the agreement will fairly bear such a construction. The assisipated profits and the mutual populties are stated therein at very high rates. Bewein, in case of failure on this part, was bound, under article 2 of the agree. meet; to pay the defendant 20,000 france wyear for 15 years, and thus was contingently liable to the extent of

1664 Alivor Mancher D. FUNNIVAL.

The evidence of M. Colin shows that the antecedent authority of the Juge commissaire is not necessary to

present payment.

300,000 franca. The arbitrators, proceeding on the principle of a guarantie of such prospective profits, have calculated damages as they have been calculated in an action in an English court, for not granting a lease where the improved value is proved to exceed the rent agreed to be received, vis. by multiplying the profit by the number of years, making a suitable reduction for

the validity of processings reforthed predefit kinds Pirante; and the wine experi they defeater on this point states in effect no mobe than his opinion asstorthe cours which he English wolicitor withde during a delegant Prench proceedings in evidence it may be toonchiled that where's syndical proceed withouthis - French counti agained the debtors of the detate it is unmecessary allege of prove the authority of the judge commission, The syndics of Beauth are in the appeals in the equi count, made parties to the lust in the room of Beseails. yet: there its not implay part of the proceedings the slightest allusion to the Jugo commissaire : Considering that these French records state minutely never incident of the trialy down even to the names and fees of the ashers, the absence of any reference to the lings commissaire tends directly toushow that this authority needed not be rement of proof. It might be are suned that the hyndrics are authorized by him to perform their dutynoforecovering debts, and the question whether they are so authorized affects only the interests of third persons; the issue to be tried on these pleadings was whether the money was due to the syndics, mot whethin the payment ought to be thus enforced. The la Goo. As c: 1190 scolds enacted; that no suit at law instituted by the resignees of an insolvent should proceed further than arrest on mesne process, without the consent of the major part of the creditors, given at a meeting called. for the purpose. Yet it has been held that the der fendadt in an action brought by the assignees can in to way avail himself of this provision, as it was not made for his benefit; and that the assigness need not in audi actions aver or prove their authority to sue; Doe v. Spencer (a), Dance v. Wyatt (b).

The testimony of M. Colin, on this point uncontradicted, clearly shows that in the French courts two out of three syndics may sue without alleging or giving

exidence of the absence or incorrector of the thirdy In the openent case there was indeed such evidence. As with ness cross-examined by the defendant occurred is to a conversation with the phaintiff's about deposed on his re-distanination, as a further part of the seme conversetions which was therefore matter to gibite the jury falls that the segent stated, that Chattenay, 4thb syndia mot joined) nwas in Italyall M. Colinfale vidence sufficiently

1834. **S** M2Wdx atild Alfother PURNIVAL.

supports the allogation in the declaration, that the plaintiffs, according to the law of France, are entitled in their outs names to sue of The nonjoinder of the third syndic could graf) the atmost conly be the subject of asples in abatement; as in the eases of executors and administrathrepsthemplaintiffs. Theremsuing of intriantner identities. There is nothing to raise the presumption of any legal obligation to hame the third at all, or of any ground for abulying to this case the strict rule of English law in the construction of the words Mjointly or separately 11 In Guthrien Ametrong(c) the court expressed an indiaposition to extend that rule, and refused to apply it where there were reasonable grounds for presuming a different intention of the parties and Here there is tenfficient ground for such presumption; it is not to be inferbed that the icourt intended that if the number of the syndies capable of seting, should be reduced to two by accident; it should be further reduced to one by the application of a technical rule, which has not been shown to belong to the French law.

The averment in the declaration, that the arbitral sentence remains in the court of commerce, is immaterial and may be rejected; Walker v. Witter (d).

⁽a) The Queen's case, 2 Brod. & Bing. 298.

⁽b) Com. Dig. title Abatement, (E. 13, 14.), (F. 10.), and cases collected, 1 Chitty on Pleading, 4th edit. 12, 13.

⁽e) 5 Barn. & Ald. 628; and see Bonifant v. Greenfield, 4 Mann. & Ryl. 190.

⁽d) 1 Doug. 1.

Aurvost and Austrian

Other words "failli" and "faillite," by the English words bankrupt and bankruptey, and there is nothing to in peach their testimony as to the fickelity of the transletion. It is evident that the French law recognishs the species of bankruptey, called in French, "faillite," bianqueroute simple," and "banqueroute freadaleus; and the translators have used the generic word. Then species do not differ from each other in what related to the rights and powers of the syndies (a).

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PARKE B. afterwards delivered the judgment of the court as follows:—Many objections were taken in this case to the right of the plaintiff, to recover. It was contended, first, that the agreement was not proved. Secondly, that this was considered as an action on the award only, and that the arbitrators were not duly appointed. Thirdly, that the award was not stade parameter to the submission, and was therefore vail. Fourthly, that the plaintiffs had no right to maintain the action. Fifthly, that the declaration was not proved. We have considered these objections, and an of opinion that they are not well founded, and that the rule must be absolute to enter a verdict for the plaintiffs.

The first objection is, that the agreement was not properly proved. This divides itself into two branches one, that even if there were no evidence of a duplicate original in existence, this proof would not have been sufficient, because the original, deposited with the notary, eight to have been produced, or clear proof given that by the written law of France it could mot be removed. Another branch of this objection is, that it was proved that there was another original of this

(a) Code de Commerce, Art. 600.

agreement in existence; that the copy was only secondary evidence and not admissible until the original was accounted for, and that no such notice was given.

Abryon and Another Tourneyate

knowledged before a notary, and is therefore not to be described; a notarial act. It was simply deposited for safe-cuttody; but there was sufficient evidence on the testimony of M. Colin, that it is the established usage in France, though without any provision of the written law, not to allow the removal of documents so deposited, and consequently to let in secondary evidence of the contents, for such evidence is admissible where it is in effect out of the power of a party to produce the original, and that was sufficiently proved in this case to the satisfaction of the learned judge, whose province it was tendecide upon this question, and we cannot say that his decision was wrong.

The second branch of this objection is that there was evidence of the existence of a duplicate original. and that there is an established rule, that all originals. ment be accounted for before secondary evidence can be given of any one. There is no doubt as to this rule. but we are not satisfied that there was any such duplif onte original in this case, which had the same binding, fortee, and affect on the defendant as the one deposited and preved; the only evidence of its existence is, the corpression "fait double" at the foot of the agreement; but what is the precise meaning of these terms, or what, was the nature of the duplicate executed in this case, if there was one, was not made out by the evidence, and malther in the numerous cross interrogatories (63) exhibited to the witness Albert, nor his depositions which were read on the trial, is there one which hints at the existence of any other obligatory document than the one deposited with the notary. It is very true that the 1325th article of the Code Civile requires duplicates

ALIVON and Another v.

where there are two interests, but I do not see how a can properly take notice of their laws, as it was a proved on the trial. The objection is one stricts juris, and beside the justice of this case; and we that it ought not to succeed, unless the existence of duplicate original, in the proper sense of that word, we more distinctly made out than it was in this case.

I now come to the objections on the merits; first, as to the appointment of the arbitrators. It is co tended, in the first place, that by the express agre ment of the parties in article 12, merchants must ! appointed, and that the Tribunal de Commerce hi power to appoint others. This depends upon the co struction of that article, [the learned baron here re article 12 of the agreement, ante, p. 757]. We do h think that the Tribunal de Commerce is restricted 1 this clause from appointing arbitrators not merchant The parties are; but the court has a general power and it is to be remarked that in none of the process ings in the French courts is the objection taken. The the Tribunal de Commerce exceeded its powers in th It is then said that the Tribunal de Commer has no power to annul the appointment made by the defendant himself, which they have done by their of 15th November 1827. [The learned baron read it Now, by this act, it appears that the appointment of foreigner as arbitrator was not a due exercise of the power received by the twelfth article, and void in was the same as if no arbitrator at all had been name by the defendant; and we must assume the judgme of the court to be, according to the French law, at less until the contrary was distinctly proved, according to the principle laid down in Becquet v. Mac Arthy (a).

Next, it is contended, that the Tribunal ought to have appointed two arbitrators and not one; but is there as

(a) 2 B. & Adol. 957.

where there are two interests, but I do not see from where there are two interests, but I do not see from where there are two interests, but I do not see from the can intoperly take notice of there away as it was not proved on the trial. I he objection is one strictly semination to be strictly seminated on the creater and we can sent and we will see the proved on the proved the provider of the case; and we will see the justice of this case; and we will see that it ought not to succeed unless time existence of that it ought not to succeed unless the existence of a duplicate original, in the proper sense of that word duplicate original, in the proper sense of that word duplicate original, in the proper sense of that word.

The third head of objection is to the award itself, which it is suggested is not warranted by the submission. The award has proceeded upon the principle that Beuvain, instead of being merely placed in statu quo, and reimbursed the expenses incurred upon the faith of the contract, (which could have been done by awarding to him as damages the expense of constructing the new works, deducting the value of the materials,) has moreover, under all the circumstances of the case, a right to be placed in the same situation as if the defendant had fulfilled his contract; and it is impossible for me to say that this principle of adjudging the damages is wrong, as being contrary to natural justice, nor is there evidence that it is not conformable to the law of France; indeed it appears to follow the rule laid down in the 1149th article of the Code Civile.

The fourth head of objection is that the plaintiffs cannot sue; and this objection subdivides itself into several: 1st, that by the terms of the appointment, two out of three cannot sue: (a) [Here the learned baron read the appointment of the arbitrators]. The answer to this objection is, that by the law of France in such a case two out of three may do an act as well as one

1(a) The termilative ephoistisent were is follesse; out the tribunal introduction and its provisoires, de la fuilifié de sieurs. Benvain & Co., le sieur Chatonney, le sieur Delonstal, et le sieur Alivon, portes en la dite liste, pour exercer les dites fonctions de syndics provisoires, telles qu'enes solutionnes dans les articles 47 à 1928 du Colles divinantes plantages applications agus executife ou iséparément; l'an ion cas d'amphélique at qu'ell apprendique l'autre, sous la surveillance de M. le Juge Commissaire."

Arivon
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ALIVON and Another v.

separately, and that is distinctly proved by M. Colin. 2dly, It is said he ought to have the previous authority of the Juge commissaire. They are directed by the appointment to act under the surveillance of the Juge commissaire by article 492 of the Code de Commerce, but M. Colin proves that they may bring a action without his authority, for that is the effect of his testimony; and though the defendant's witness Girari gave evidence to the contrary, it seems to amount only to this, that a syndic would not act properly in doing so, not that the want of previous directions would avoid the act and constitute a defence to the action; and this is in conformity with the principle in which the case cited for the plaintiff relating to actions brought by assignees of insolvents in this country were decided 3dly, It is insisted that by the law of France, two cannot maintain an action for the debt due to the bankrupt and this also depends upon the evidence. may sue appears by articles 492 and 499 of the God de Commerce, both given in evidence; that the bankrup is deprived of the administration of his effects, appear by article 412, also read at the trial; and M. Coli deposes that two have the same power to act unde this appointment as three, and there is no evidence to the contrary. 4thly, It is insisted that if two can biffe an action, it is a condition precedent upon the construc tion of the instrument of appointment, that the thin should be absent, or should have objected to the at done, and that there was no proof of either circum stance in this case; but we are of opinion that this would be to put a very strict construction upon the term of the appointment. It seems to us that the act of two only sufficiently implies the absence or want of consent of the third, and that the effect of the authority given by the appointment is, in substance, to authorize two t do valid acts as to third persons without the other

1834. 52

Altvon

and Another

FURNIVAL.

and it was in fact proved that by the law of France one of the arbitrators might act if the other two were absent or not consenting, but that they should not so act without the absence of or want of consent of that other. Lastly, it is said that though two may act and bring an action, yet they must sue in the name of all. Now the effect of the testimony of M. Colin is, that "Two hay sue in France without a third, and the withess . See the defendant does not prove the contrary; and there seems no reason why it should not be so. The property in the effects of the bankrupt does not appear to be absolutely transferred to these syndies in the way that those of a bankrupt are in this country to assignees; but it should seem that the syndics act as mandatories. or wgents for the creditors, the whole three or any two or the of them having the power to sue for and recover the debts in their own names. This is a peculiar right of action created by the law of that country, and we think it may, by the comity of nations, be enforced in this as much as the right of foreign assignees or foreign corporations appointed or created in a different way from that which the law of this country requires; Detch West India Company v. Moses (a), National Bank of St. Charles v. De Bernales (b), Solomons v. **Ross** (c). We do not pronounce an opinion whether this objection is available on the plea of nil debet, or ought to have been pleaded in abatement, though we were much struck with the argument of the learned counsel for the plaintiffs on that point, for we think it in not available at all upon the evidence in this case. The fifth head of objection is that of variance; that

> (b) 1 R. & Moody, 190. (a) 1 Strange, 612.

the award is said to be registered in the Tribunal de Commerce instead of the Cour de premiere instance, but the answer is, that this is clearly a surplusage.

⁽c) 1 Hen. Blackstone, 131.

1834. ALIVON and Another FURNIVAL.

The sixth, that there is a variance, because Benein is averred to be a bankrupt, whereas he desirely minsolvent in "en etat de fallité ;" but this dependientirely upon the argument that the English term hinkrupt necessarily means the same as the French town route, which it does not; and it is to be observed, that in the English copy of the appointment of syndics the word faillité is translated bankoupten. These are al the objections to the plaintiff's right to recover the think that they are not well founded, and that the action is maintainable, without attributing to the acts of any of the French courts the same force as if they had been judgments between the litigating parties out sub The third count is that adapted to the plaintif's

of good Brandy C case.

See the United States Judge Story's Commentaries on the Confect of Laus, pp. 436-515; 800, Buston U.S. 1834. (* 511) Grade will of m id a self to hom Salara gara

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March 1 Comments on and to have TIPPETTS aggringt HEANE OF HE SCORE

Though a debt from defendant to in amount than a subsequent payment, is proved to have existed at a time previous to such payment, and

INDEBITATUS assumpsit for board and lodging. -Pleas: the general issue, and statute of limitations. plaintiff, larger At the trial before Vaughan B., at the sittings at Guildhall last Hilary term, it appeared that the son of the defendant was an articled clerk of the plaintiff's partner, and boarded in the plaintiff's family from 11th August 1825, to the 11th December 1826. The plaintiff's demand was for the balance due on this

no other account appears to have existed between them; the mere fact of the payment of a sum by defendant to plaintiff is not enough to take a case out of the statute of limitations without some evidence to satisfy a jury; first, that it was a payment of a debt, and next, that it was not the discharge of a balance due, but a payment intended to be applied to the part discharge of the particular debt.

A defendant is not entitled to a rule to enter a nonsuit on a point taken at the

trial and afterwards approved by the court, unless the judge at nisi prius gives him leave so to move; but can only have a rule for a new trial.

1834.
TIPPETTS
I HEANE.

necessit, patritisel rate of 35% performant. In a halance sheet of indebtal and seledits, which the desendent, had -exhibited lin November 1826, his admitted a debt of -25kd tombe idde ato the aplaintiffagenthis account on A -witness, who acted as agent for the defendant in 1829, tpstoved v by don sentry in his cash book, that the had on "Althodugues in atheta year, paid by sheque 104 to the Infaintiffe on laccount of the defendant; he recollected that the defendant was present at the time the cheque washanded over to the plaintiff, but he did not know ton what account inti was spaid, and had no mecollection toflany bthen circumstance of the transaction but from this memorandumite. There was no proof of any other simulamoney having been haid by the defendant to the plaintiff since November 1826. Ludlow Serit. for the the sendant, contended for a nonsuit, as there was no evidence of a specific appropriation of the 10l. to the account in question, so as to prove a part payment of the debt in question within six years. learned baron said that he should leave it to the jury, that if they were satisfied that the 101. paid by the witness in 1829 was applicable to this particular demand, it was evidence of a fresh promise, which would support the present action, and added, that where the existence of several accounts is shown, a question might arise on what account a particular payment was made; but as here there was no evidence of any other account between the parties, they would naturally conshude that it was made on account of the board. The jury found a verdict for the plaintiff for 271. 5s. 10d., and the learned judge refused to give the defendant's coursel leave to move to enter a nonsuit.

"Endlow Serjt. in Easten term, obtained a rule to set

TIPPETTS

V.
HEANE.

new trial, on the ground that the jury thought hey must necessarily apply the payment on 4th August 1829 to some pre-existing debt, and therefore found that it was made in respect of the only debt that had been proved. But there was no evidence that there were not other accounts between the parties; and even if it was not necessary for the plaintiff to prove this, be should have shown that the payment was made on account or in part payment of a larger sum respectly admitted by the defendant to have been due to him; as the bare payment of a sum of money, without my evidence to apply it to an existing debt, is not enough to take it out of the statute of limitations; Guena to Foster (a), Martin v. Knowles (b), Brigstocker, Smith (c), Long v. Greville (d), Kennett v. Milbank (c).

Kelly showed cause. First, in the absence of other proof, the inference is, that the 10% was paid on account of the board and lodging of the plaintiff's son Secondly, as a debt of 251. was admitted to exist in November 1826, and no other account appears between the parties, and 101. is the only sum proved to have been since paid, the jury ought to have taken it to be only a part payment of that larger subsisting debt, and if so, the case is taken out of the statute, At the tried the only point contested was the existence of any other account to which it could be applicable, as it was not pretended that this payment was the actilement of a balance. The onus lay on the defendant to prove the payment to have been on account of another demand. If there had been no plea of the statute of limitations, after such evidence of a larger sum having been due in November 1826, and the payment of 104

⁽a) 3 B. & Ad. 507.

⁽d) 3 B. & C. 10.

⁽b) 1 N. & M. 421.

⁽e) 8 Bing. 38.

⁽c) Ante, Vol. III. 445. .

in 1829, the defendant could not have insisted on any presumption that the rest had been settled, and that the 10% paid was in payment of a balance, but must have proved the rest to have been paid; nor can any such presumption of payment arise on these pleadings.

TIPPETTS V. HEARE.

Ludiou Serjt. and Petersdorff contra, were stopped.

PARKE B. (a)—The difficulty in this case is to discover the materials on which the jury found this to be such a part payment of a pre-existing larger debt; as was requisite to take the case out of the statute of limitations. I cannot see that the payment of the 101. by the defendant to the plaintiff within six years, was, under the circumstances, sufficient evidence to go to a jury, that it was such a part payment. For, to take the case out of the statute, it must first be shown that the part payment was made on account of a larger debt; the principle on which it takes a case out of the statute being, that it admits a greater debt to be due at the time. That is not necessarily established by the bers evidence that 10% was paid to the plaintisf by a third person, on account of the defendant. Next, it must be shown to have been a payment in part discharge of the particular debt sued for, but there was here no proof of the application of the 10% to such a purpose. It was said, that as there was no evidence of any other debt due from the defendant to the plaintiff, the jury might be warranted in concluding the 10% to have been paid on account of this debt; but it did not appear that it was a payment on account, and not of a balance; nor was any acknowledgment made at the time of such payment, that a greater sum was due. Then if, from what passed at the time, it could be affirmed to have been a part payment of a pre-existing

(a) Lord Lyndhurst was sitting in equity.

TIPPETTS

HEANEN II

larger debt, it would take the case out of the statute; but in the cabsence loss such proof a reserve that must be granted

VEL-PASS for breaking and entering the plainful?

Alderson B.—The affirmative of the issue not be of their in the issue not be of their in the issue not not be of their in the issue not not be of their in the payment of the issue of the interest of

GURNEY B. concurred. non-end of the readque

Per Curian.—The rule must be absolute for a new trial only. A party cannot have a rule to enter a non-suit, unless leave was reserved by the judge so to move; for the plaintiff had a right to refuse to be non-suited, and insist on going to the jury (a).

condition and consists to restaure to active services Rule absolute accordingly.

COLUMBIA DE

(a) Minchin. v. Clemers, h. B. S. Ald. 232. followed by Machine v. Said. 2 Y. S. J. 426; Shepherd v. Chetter. (Birthan v.), 6 Bing 1,475; Graver Ryan, 2 Chit. R. 271; Marsack v. Ellis, 1 Man. & R. 511, 513; Saide v. Benedick, 2 M. & P. 301. So if at the trial the plaintiff had refused to be nonsuited, and the judge lited directed the jury to find a verdice spain him, the plaintiff might have tendered a bill observe the part which would be deprived if the court were to order a nonsuit to be extremely with out leave given at the trial, per Lord Ellenborough, 1. B. & Ald. 252; but see Gould v. Robson, 8 East, 580, control. As to the power of a judge at not prive, in an undefended cause, to nonsuit the plaintiff on a legal objection, with leave to move to enter a verdict, see Treacher v. Hinton, 4 B. & Cr. 431, 1 Tidd, 9th ed. 900, 904, &c.

arran alche at would take the case on of the statute ed term is HOOKER against Nyze and Another.

1834.

TRESPASS for breaking and entering the plaintiff's dwelling-house and carrying away his goods. Plea: sua propria that the plaintiff at the time when &c., held the said cansa to a dwelling-house as tenant to the defendant Nye, under the demise at a yearly rent payable quarterly, and that trespass in distraining as demise at a yearly rent payable quarterly, and that trespass in or two quarters became due and was in arrear; distraining as longered to not send that the plaintiff of the quarter became due and was in arrear; distraining as longered to not send to the said dwelling-house, in his bailing, entered into the said dwelling-house, in payable that the plaintiff of the propria. Replication de injuria sua is bad on year of the propria. General demurrer and joinder.

If a plea

Comyn in support of the demurrer was stopped by plaintiff held the court, who called on .

Kinglake to support the replication. It will be said that the replication is bad; first, because it has plies generally, not offered to put in issue one fact only of several sumes that the unit of are stated in the plea; or secondly, because reversion is in the landlord, if is replied generally in bar to a claim of interest and that therein land. As to the first objection, if there are several fore he has a matters set out in the plea which all go to make train. Any up one subject-matter of defence, the replication is good. Bardons v. Selby (in error) (a). In that case reversion, all the circumstances of excuse were set out in the raised on a avowry, and they resemble those in the plea, except special replithat the justification was there under legal process, instead of under the common law right of a landlord to distrain, and that here an interest in land is claimed, which was not the case in Bardons v. Selby. In the report of that case while in the King's Bench, Patteson J. there says (b), "The cases of Robinson v.

The replication de injuriâ

If a plea allege that the the defendant under a demise, and the plaintiff reright to disquestion as to the landlord's should be

⁽a) Ante, Vol. III. 431. See S. C. 3 B. & Ad. 2.

⁽b) 3 B & Adol. 9. and Crogate's case, 8 Rep. 132.

Hookes Nyu/. bas

Rayley (a) and O'Brian v. Somon (h) are authorities to show without their implication icannot be objected oto, on account of its putting in itsue several fadts provided the several facts so put in issue constitute one ground of defence, which, as it seems to me, they always will where the pleas is properly pleaded, showever humerous they: may be, since, if they constitute more than one cathe the pleaswill be double." Allete, though the pleasinvolves) several facts, get they amount only to one point of excush, namely, a right to distrain. Secondly, it is an objection to the replination, that it puts in issue an interest in land, because sufficient appears in the gleadings for the court to give judgment "according to the very right of the cause; " and then since the state 4 Ata. c. 16 and (c), the court will not regard any imperfection in the pleading, unless it is specially democred to L'Alderson Be Suppose a matter of record (d) to have been involved in the defence, which would require a different mode of trial, and that the replication was as here, de injurià generally, would that be substance or form within 4 Am. c. 16.? In Selby v Beardonn (e), Lord Tenterden who differed from the rest of the makeshoo arisa march on it Man!

⁽a) 1 Burr. 516.

^{(6) 2} B. & C. 996.

⁽c) Which exacts, that where any denumer shall be joined, the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, or defect in any writ, return, plaint; or decidration, or other pleading, process, or course of proceeding whatsoever, except about any which the party demurring shall specially and particularly, set down and express together with his demurrer, as causes of the same, notwithstanding that such imperfection, omission, or defect might have heretofore been taken to the matter of attistance, and not sided by the stat. If this entitled &c. so as sufficient matter appear in the said pleadings upon which the court may give judgment according to the very right of the cause.

⁽d) As in Furnden v. Weeks, 3 Lev. 65, where so an action of trespens the defendant justified an arrest under a writ and warrant, and the replication de injuris was held bad on general denurrer. See post, 739.

⁽e) 3 B. & Adol. 16.

1834.

HOOKER NYE

Odton/ >

court, does not treat it as matter of folds, and the other! judges only say that they feel bound by the present dents. In all the cases in which this question thas arisen since the state 4 dans c. 160 of handbeet low and Another. special demurrer Cooper v. Monke (a), (Cocherill Del) Armstrong (h), Bell v. Wardell (c), John w. Kitchen (d), !! O'Brian v. Saxon (e) Selby v. Burdons (f) John addorum Weaks (g), which was decided an general denserges; was before the stat. of Ann. [Lord Lyndheres Co Bev But it was: after 27 Eliza o. 6; mand as it was decided o on general demurger, it shows that it is not ofere man ter of form, but of substance, or its would have been within that statute. But there are woods in the statute of Ann. which are not in the stat of Elia. and it was passed to include "such imperfections, emissions, for defects, as might theretofore have been taken to the matter of substance, and not aided by the statute of: Elizabeth. [Lord Lyndhurst C. B. But in the stand tute of Ann. matters of form, only are enumerated. If the demurrer to the raplication may be sustained. the plea is bad in law, because it does not state anno reversion in Nye, and therefore shows no right in kim! as landlord to distrein. It is the duty of the defendant to set out in his plea a title which the tenant is estopped from disputing; but the tenant is not bound to admit more than a right in the landlord to grant the lease which he holds under him: he is not estopped from disputing that he has any more extensive right-Preece v. Corrie (h).

Comyn in reply on the last point. The plea is in the Though possibly the landlord may not usual form. have the reversion, the presumption is, that he has

⁽a) Willes, 52.

⁽b) Willes, 99.

⁽c) Willes. 202.

⁽d) 1 B. & P. 80.

⁽c) 2 B. & C. 908.

⁽f) 3 B. & Ad. 2:

⁽g) 3 Lev. 65.

⁽h) 5 Bing. 24.

Hooker 1899 and Another!

the freehold. If the landlord's right has determine that question should be raised by the replication.

SSUMPSIT to recover 402, the difference between

Lord Erynbauran Coll. hat Daothexiir stopoint wed ha in no doubt inthe error is clearly inomatter of substant and the replication is the reflicted ball on general sheur rer. As to this 4 Amistrato, whreathinibler of plantical and omissions representational interests and antias being matters of forth and it is then tenacted?" th and the conitoshalbigive sjudgment incoording the thic ve right of the caused without regarding hay! (dich) infpe fections, emissions or defects, of unwether matter the the material vexcept the same shall the restoressly!s down and shown for batter of definitions: It This tense : ment is therefore limited tecklicienum cratical intrenta tions, builtsions, or one matters of the like matter tendant should agreead at the edition this sentant since " Ast to the dast point, the oplea ist in the surveil form it states that they plaintiff held hiten by une seasons; the defendant Nys, under alcentaibide mise i de Preces Corrie (d); the point belittion to invalidate the landler petversion.was unined by a special plea in ban to the so nizamet of There is direct a prima factor rightfin the late lord to distraid, and the omusis on the other porty their dhat such it eight addisend texist. built that or The first count of the declaration stated the above standards is it is the modited maken the after the cessary introductory statements, averred as follows: that after &c on thin Angle st in the year 1832. we the defendant agreed with the superior landlord the premises, to will, the Remge Ring, for a longer m, to wit, for a t rm of three quarters of a year head the said term granted by the seid aemoraceum vergeoment; and by virtue thereof remained in nosin of the said premises after &c. to wit, for stone

e og ode zad odgir skralbuta alt di blace ed en Sinkkin against Ashurst, Gent. one, &c.
Sinkkin against Ashurst, Gent. one, &c.
Sinking of the control of th

A SSUMPSIT to recover 40l., the difference between An underthe value of fix sures and the Sames paid by the defendant on itaking postersion of them; under an extreet at the determent dated 20th July 1929 rbf which he perest has the original take, and the plaintiff to plet, dertain premites; then in lease, and is the occupation; of the plaintiff, if four the sterm of two the reveryears wanting three days from the 8th of August then sioner to hold over, is quan a next," subject the learning coverants premong others, this tenant at purchase all the fixtures in the said house as by a list sufferance; and the mere thereafter writtengest the sum of one shundred guineas) fact of occuto be paid upon having postestion, which was to be pled with the on or before the said ath day of Augusthea next, and payment of the said fixtures and arsides were to be valued in the time of occuusual way before having pessession . And if the said pation, does defendant should agree with the superior landlerskof presumption the edil premises for a longer through thus that by the for years, said agreement granted he was not part such further unless there is sum at which the said articles were walked; and if he to show an should not agree with the landlord for an further term agreement for at the end of the said term thereby granted, then the term. said plaintiff was to have the diberty of taking the said fixtures at the sum of sixty pounds, if he should elect so to do; that pays the said sum; to the said defendant on or before the 5th day of August 1832."

The first count of the declaration stated the above agreement with mutual memises, and then after the necessary introductory statements, averred as follows: "that after &c. on 17th August in the year 1832, at &c. the defendant agreed with the superior landlord of the premises, to wit; one George King, for a longer term, to wit, for a term of three quarters of a year beyond the said term granted by the said memorandum of agreement; and by virtue thereof remained in possession of the said premises after &c. to wit, for three 1884.

in possession mination of permitted by rent for such not raise the a demise for a

material. The second count on a cons cuted, was similar in substance to the sittings at Guildhall after Hilary term mey B. it appeared, that in 1818 Me. Rin premises in question, which consisted of grounds at the foot of Highgate Hill n granted a lease of them to a Mr. Hughe years, from the 11th August in that y 1823 the plaintiff took an assignment of 1 Hughes, and in August 1830 let the d possession under the above agreement. were valued at 147%, of which the de 106% under the agreement upon takin The plaintiff's term in the premises expir August 1832, and the house never reve Although the demise to the defendant, un ment, fell short of that period by three timed in possession till Lady-day 1831 landlord, proved that the rent was origin annum, but for the interval after the 11th to Lady-day 1883 the defendant remained and paid him 811.5s. being at the incr

1801. per annum. Ring also proved that

inet... (Signed) G. Ring." The word "rent" appeared

to have been originally written instead of "occupation." but had been struck out, and the latter inserted in its steadil: The learned judge, in his direction to the juvy, said that to support the action the plaintiff should make and that the defendant had agreed, with his appearer landlers, for a further term; but no ingulty had been .made by him about the existence of any agreement, and the reachet did not prove such at Atraement, it heing . Sent mesunations, not for trants and, therefore, I negatimes the existence of any agreement for a terminas the leading could not distrain for occupation, though he .might for rent reserved under a demiss (a)! The jury found a verdict for the defendant on the breach set and above of In Buston term Kelly mayed to spt aside the verdict; for the defendant for misdirection, as the indee; should have told the jury that the money paid was in the spature of an increased next, and was evidence of an agreement for a term ... The sight and Hoggins were to show cause, but the court called upon to mill a secured to him Copies and int Irons 15: in Kelly and Butt to support the rule. The question is did the parties intend to agree for that which would he in level signification a new term, or for any occupa-- tion of the premises which would entitle the tentant to the benefit of the agreement and fixtures. [Parke B. There must the afterm, and if so, that must in law be taken to he a tenancy for a term of years! though the dimino be only for a quarter of a year &q. 308)].

"The maining of the parties, and the strict words of the instrument, must be knowed to a now they never had in view the technical distinction auggested to the jury by which in the case of a regular tetrancy, a hadded

1884. Simpling. P. Annyber.

would be able to distrain, but in the other cases an (a) Major V. Johnson, S Taimt. 148; Divik v. Himar, S B. & A. 322.

⁽b) See Ca. Litt. a. 67; Bottin vi Martin, 1 Campl \$1711. Peri vil 1.

SIMPEIN v.
ASHURST.

action for use and occupation only would lie. intention, as can be collected from the terms of the agreement, was, that if, at the end of the defendant's term, the house should revert to the plaintiff, the fixtures were to be bought by the plaintiff at a diminished sum of 601.; but that if the defendant kept possession to the end of the plaintiff's term, they were to be taken at the valuation by the defendant: the reason being that they would be of more value to him then, as against the superior landlord. Here the defendant, by continuing in possession during the three days reversion reserved by the plaintiff, has adopted the alternative which was open to him, of continuing the tenancy; and as he prevented the plaintiff from regaining possession of the fixtures, without being liable to be treated as a trespasser, he must pay the full value for them. But even if a contract for a demise should be proved, the evidence of the landlord shows that there was some new agreement for a holding, and the rent was increased, and it lay in the defendant to show that it did not amount to a demise for a term. At all events the continuing in possession and paying rent is clearly evidence of a tenancy (a); à fortiori, when coupled with Ring's reference to his solicitor and a receipt of rent, there was evidence of an agreement for a term.

PARKE B.—The jury received the only proper direction. To entitle the plaintiff to recover a larger compensation for the fixtures, he must show that before the end of the first term in the premises an agreement was made by the defendant for a new and a longer term; for the agreement must be for a term, however short. Here the defendant remained in pos-



⁽a) Ros v. Ward, 1 H. Bla. 97; Dos v. Wests, 7 T. R. 83; Bishop v. Howard, 3 B. & Cr. 100.

session afterwards as a tenant by sufferance (a), and might be treated by the landlord either as a tenant at will or a trespasser. He chose to treat him as a tenant at will. If the landlord does not choose to take the fixtures, the tenant gets them, and must remove them in the three days. The case is perfectly clear and free from doubt. The jury must have negatived the existence of any such agreement.

1834.
SIMPKIN
v.
ASHURST.

BOLLAND and ALDERSON Bs. concurred.

GURNEY B.—The question at the trial was, whether the plaintiff had made out an agreement between the defendant and the landlord for a longer term? They met, but no agreement was made; and though the defendant afterwards remained on the premises, holding over for a time, for which use and occupation, and not as rent, an increased sum of money was paid, but under no previous agreement. If there had been an agreement, though only for six months, the case might have been different.

Rule discharged.

1834.

STOKES against WHITE.

In an action on the case against a party for causing the arrest of a person privileged from arrest, (e.g. a witness attending on his subpœna or a practising attorney) thereby putting him to the expense of finding bail and procuring his discharge by order of a judge, the plaintiff must show that his imprisonment at the particular time in question took place by some act of the defendant. and that he knew or recognized the circumstances accompanying it, and also knew that the party arrested was privileged at that time.

Whether such an action is maintainable, quærc.

The offices of the sworn

The defendant was sued as one of the side clerks of Stephen Richards, esq., one a the sworn attornies of the office of pleas of his me jesty's court of Exchequer at Westminster. Declar tion stated, that whereas before the committing of the grievances hereinafter next mentioned, to wit, a 16 June 1832, there issued out of the Excheque of Pleas a certain writ of our said lord the king called a subpœna ad testificandum, directed to the plaintiff and John Doe, commanding them to appear in their proper persons before his said majesty justices assigned to take the assizes at Bristol, in an for the city of Bristol, on Saturday the 18th day of August then next coming, by nine of the clock the forenoon of the same day, and so from day to day till the cause was tried, to testify the truth according to their knowledge, in a certain action then pending the said court of his said majesty's Exchequer, between J. Smith, surviving assignee, plaintiff, and J. Buckle W. C., and J. P. defendants, of a plea of trespas on the case upon promises, on the part of the plain tiff, and at the aforesaid day, by a jury of the country between the parties aforesaid, of the plea aforesaid to be tried; and that they the said Thomas Stoke and John Doe should in no wise omit, under the pe nalty of 100/. And whereas afterwards and before the committing the grievances &c., to wit, on 16th August 1832, the said plaintiff then residing in the island of Guernsey, being the place of his abode, was duly served

and side clerks of the Exchequer are not abolished by stats. 1 W. 4. c. 70. or 2 & 3 W. 4. c. 110., but as the sworn clerks are thereby disqualified from acting at practitioners, the side clerks can no longer sue in their names, though they may still practise there as attornies without being admitted as such.

with a copy of the said writ of subpæna ad testificandum, and in obedience thereto he the said plaintiff left his said place of abode, and attended in his proper person before his majesty's justices assigned to take the assizes at Bristol, in and for the city of Bristol, on Scturday 18th August, in the year aforesaid, and so from day to day, until the cause was tried, to testify the truth according to his knowledge in the said action so depending as aforesaid; and which said action afterwards, to wit, on 22d August 1832, was tried by a jury of the country between the parties aforesaid, of the plea aforesaid, to wit, at &c. Yet the said defendant well knowing the premises aforesaid, but contriving &c. to deprive the plaintiff of the benefit of his privilege as a witness attending the trial of the said action, and to put him to great trouble, charges, and expenses of his monies, afterwards, and before a reasonable time had elapsed for the return of the said plaintiff from Bristol aforesaid, to his said place of abode in the island . de Guernsey aforesaid, to wit, on 23d August 1832, at are aforesaid, wrongfully and unjustly caused and procured the said plaintiff to be, and the said plaintiff was then and there arrested by his body upon and by virtue of a certain writ of our said lord the king, called an clies capies of privilege, before then issued out of the said court of Exchequer at Westminster aforesaid, direlated to the sheriffs of Bristol, by which said writ our said ford the king commanded the said sheriffs (as before he had commanded them) that they should coult not by reason of any liberty of their city, but should enter the same and take the said plaintiff and John Doe, wheresoever they should be found in the said sheriff's bailiwick, and them safely keep, so that they might have their bodies before the barons of his said majesty's Exchequer at Westminster, on the 2d November then next coming, to answer the said Thomas

STOKES

v.
WHITE.

1834.

STOKES against WHITE.

In an action on the case against a party for causing the arrest of a person privileged from arrest, (e.g. a witness attending on his subpœna or a practising attorney) thereby putting him to the expense of finding bail and procuring his discharge by order of a judge, the plaintiff must show that his imprisonment at the particular time in question took place by some act of the defendant. and that he knew or recognized the circumstances accompanying it, and also knew that the party arrested was privileged at that time. Whether

such an action is maintainable, quære.

The offices of the sworn

The defendant was sued as one of th side clerks of Stephen Richards, esq., one the sworn attornies of the office of pleas of his m jesty's court of Exchequer at Westminster. tion stated, that whereas before the committing of th grievances hereinafter next mentioned, to wit, a 16 June 1832, there issued out of the Excheque of Pleas a certain writ of our said lord the king called a subpoena ad testificandum, directed to the plaintiff and John Doe, commanding them to appear in their proper persons before his said majesty justices assigned to take the assizes at Bristol, in an for the city of Bristol, on Saturday the 18th de of August then next coming, by nine of the clock i the forenoon of the same day, and so from day to day till the cause was tried, to testify the truth according to their knowledge, in a certain action then pending i the said court of his said majesty's Exchequer, between J. Smith, surviving assignee, plaintiff, and J. Buchk W. C., and J. P. defendants, of a plea of trespan on the case upon promises, on the part of the plain tiff. and at the aforesaid day, by a jury of the country between the parties aforesaid, of the plea aforesaid to be tried; and that they the said Thomas Stoke and John Doe should in no wise omit, under the pe nalty of 100l. And whereas afterwards and before th committing the grievances &c., to wit, on 16th Augus 1832, the said plaintiff then residing in the island o Guernsey, being the place of his abode, was duly server

and side clerks of the Exchequer are not abolished by stats. 1 W. 4. c. 70. or 2 & 3 W. 4. c. 110., but as the sworn clerks are thereby disqualified from acting a practitioners, the side clerks can no longer sue in their names, though they may soll practise there as attornies without being admitted as such.

STOKES

v.

WHITE.

with a copy of the said writ of subpæna ad testificandum, and in obedience thereto he the said plaintiff left his said place of abode, and attended in his proper person before his majesty's justices assigned to take the assizes at Bristol, in and for the city of Bristol, on Saturday 18th August, in the year aforesaid, and so from day to day, until the cause was tried, to testify the truth according to his knowledge in the said action so depending as aforesaid; and which said action afterwards, to wit, on 22d August 1832, was tried by a jury of the country between the parties aforesaid, of the plea aforesaid, to wit, at &c. Yet the said defendant well knowing the premises aforesaid, but contriving &c. to deprive the plaintiff of the benefit of his privilege as a witness attending the trial of the said action, and to put him to great trouble, charges, and expenses of his monies, afterwards, and before a reasonable time had elapsed for the return of the said plaintiff from Bristol aforesaid, to his said place of abode in the island. . cf: Guernsey aforesaid, to wit, on 23d August 1832, at aforesaid, wrongfully and unjustly caused and procered the said plaintiff to be, and the said plaintiff was then and there arrested by his body upon and by virtue of a certain writ of our said lord the king, called an chies capies of privilege, before then issued out of the mid-court of Exchequer at Westminster aforesaid, direlated to the sheriffs of Bristol, by which said writ our said ford the king commanded the said sheriffs (as before he had commanded them) that they should enit not by reason of any liberty of their city, but should enter the same and take the said plaintiff and John Doe, wheresoever they should be found in the said. sheriff's bailiwick, and them safely keep, so that they might have their bodies before the barons of his said majesty's Exchequer at Westminster, on the 2d November then next coming, to answer the said Thomas

1884. STOKES v. WRITE.

White, one of the said clerks of Stephen Richards, ex one of the several attornies of the office of pleas in hi said majesty's said court of Exchequer, of a pleat trespass, and that the said sheriffs should have the that writ; and which said last-mentioned writ was the and there marked and indorsed for bail for 741. , the said defendant then and there wrongfally and the justly caused and procured the said plaintiff to ! imprisoned and kept detained in prison upon the mi arrest for three days then next following, and until the said plaintiff in order to procure his release and di charge from the said imprisonment; was forced in obliged to and did procure certain persons, "to vi J. P. H. and W. H. B. to become bail for the appeal ance of him the said plaintiff in the court of Excheque at Westminster aforesaid, to answer the said defende decording to the exigency of the said writtend the that occasion the said plaintiff and the said J.P.Him W. H. B. were forced and lobliged to und: did lente into a certain bond or obligation in a large sum's money, to wit, the sum of 1481. Gs. for the purper aforesaid, by means of which said several premises to said plaintiff not only suffered great pain of body in mind, and was greatly exposed and injured in his cited and circumstances, but was also thereby put to gree trouble, charges, and expenses of his monies, in we about the procuring of the said bail and enteritie the the said bail-bond, and obtaining his release and dis charge from the said imprisonment, and in and show the applying for and obtaining a certain order of Hon. Sir J. L. knt. one of the justices of the coult's King's Bench, for the discharge of the said plainti out of the custody of the said sheriff of British and for the delivering up of the ball-bond to be can celled, and the said plaintiff hath been and in bythe

(a) Sce Pritchitt v. Boeven, ante, Vol. III. 949.

STOKES V. WHITE.

promises and otherwise greatly injured and damnified, to mit, at &c. ... The second count substantially remembled the first, but did not state the defendant to be a side clerk, or, state the subposts at length. Third 49Hptm://And whereas.calso | the said plaintiff, before and at the time of committing the gribvance hereinafter next, mertioned, was from thence and hitherto hath been and still is one of the attornies of the court of our said lard, the king, before the king himself at Westwinter, and the said plaintiff during all that time hath prospented and defended and still doth prosecute and daferal, divers, suits, and, pleas, in the same court, for divers liege, subjects of, our said, lord the king as their attorney, and the said plaintiff, and all the attornies of the said last mentioned court prosecuting and defende ing suits and pleas therein for their clients, before and #5.4h\$ (time coff committing the said last-mentioned spicyspoo, ought from an ancient and laudable custom. from time immemorial used and approved of according to the laws and customs of this realm, and the liberties and privileges of the said last-mentioned court, to have han and still of right ought to be free and exempt from heing farrested, and, holden to special bail in any per-- aspel action at the suit of any other person or persona. the will all plaintiff well knowing the premises, but contriving &c. to depuive plaintiffief, the henefit of his said last-mentioned priving lege, and to put him to great trouble, charge, and exments of this monies, afterwards, to wit, on 23d August. 18802 at 1810 to wrongfully and unjustly caused and profe corred, the said plaintiff; to be and the said plaintiff was them and there arrested, &c. (las in first count) Thei lant) tout time ly stated the plaintiff to be an attorney. and that the plaintiff well knowing the premises, and. contriving to injure the plaintiff arrested him, as in Plea: general issue, not guilty. first count.

STORES
v.
WRITE.

trial before Lord Lyndhurst at the Middlesex sitting after last Trinity term the plaintiff was proved to be duly admitted and certificated attorney of the King Bench, and the defendant to be a side clerk of M Richards, one of the four sworn clerks or attornies the office of the clerk of the pleas of the court of E chequer. The attorney general, Sir John Campbell, f the plaintiff, having admitted a debt of 74L 3s. due fro him to the plaintiff, for business done as his Londs agent, it was proved that a side clerk or other office of a sworn attorney of the office of the clerk of th pleas of the Exchequer, had always exercised the pa vilege of arresting and holding to bail attornies of th other courts, on a writ of capias of privilege issuing of of the Exchequer of Pleas (a). A writ of capias of pr vilege was shown to have been issued from the Exch quer office on 18th April 1832, (the first day of East term) at the suit of White, (recited thereon to be side clerk of the court) against Stokes, indorsed for bail for 74l. 3s., and directed to the sheriffs of Bristo but was not executed, the plaintiff having gone to n side in Guernsey in that month. On Saturday 18t August, the commission day of the Bristol assizes, th plaintiff arrived at Bristol, from Guernsey, by a steal packet, in pursuance of a subpæna with which he ha been served, to attend as a witness in Smith v. Buch and others, about to be tried at those assizes. Wednesday 22d August an alias capias of privilege tested 16th June, was issued by White in person, d rected to the sheriffs of Bristol, and was lodged wit them the next day, Thursday the 23d. The copy give in evidence contained no caution against arresting privileged persons. The trial took place on the 22d and the plaintiff was examined; he being feebl returned to his lodgings directly after the trial ended

⁽a) See Walker v. Rushburg, 9 Price, 16; 1 Y. & J. 199. S. C.

STOKES

V.
WHITE.

and was arrested there about noon on the Thursday, while still in his wrapping gown and slippers, having never left the house. The plaintiff on being arrested showed the officer the copy of subpœna with which he had been served, and claimed his privilege. After remaining in custody twenty-six hours, he gave bail and was liberated. It was shown that at that time coaches ran daily from Bristol for Weymouth, and that a steam packet left Weymouth for Guernsey on the evenings of Tuesday and Friday in each week. No evidence was given that the plaintiff had made any preparation, or taken any step for leaving Bristol on his return to Guernsey. The summons and order of a judge for discharging the plaintiff on common bail, and delivering up the bail-bond to be cancelled, on the ground that he was protected by his subpœna, were put in and proved. It was also shown that the plaintiff's managing clerk had opposed that order being made. The plaintiff had a verdict for 101. damages, the defendant having leave to move to enter a nonsuit, or in arrest of judgment on certain points then raised, and which are afterwards stated.

In last Michaelmas term, Talfourd Serjt. moved accordingly on behalf of the defendant. The first and second counts rest the plaintiff's ground of action on the violation of his privilege from arrest as a witness; the third and last on the same privilege as an attorney. The latter counts neither allege that no debt was due from the plaintiff to the defendant, nor that the arrest was malicious or without probable cause; but all of them allege that the defendant well knowing the premises (viz. the plaintiff's privilege and the circumstances under which he was then at Bristol,) but contriving &c. to deprive him of the benefit of his privilege (as witness or attorney) procured him to be

be brought in trespass and not in neither case will the plaintiff be liable the scienter. This is an action, in for first impression. the scienter. This is an action, in for first impression. It is not a personal individual, the breach of which by a gated as a personal damage to him, for a remedy by action, but is the privile which he attends as a suitor or with for the sake of the public, and to be obtained for a discharge to that courts vilege been personal instances of action privileged would have been found. In Control of the public of the public of the public of a discharge to that courts wilege been personal instances of action privileged would have been found. In Control of the public of the pu tavern, on his return from attending the same and false imprisonment, he was no pass and false imprisonment, he was no argument of a rule to set aside the nonsuit in delivering the opinion of the whole question was, whether the privilege of t extended to suitors redeundo did so vitiat suspend the operation of the writ, that the suspend the operation of the writ, that the suspend the operation of the writ, that the thereon became an act of trespass on the land the court held not, as in none of the beautiful the court held not as in none of the beautiful the land the court held not as in none of the beautiful the land the court held not as in none of the beautiful the land the court held not as in none of the beautiful the land the

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STOKES V. WRITE.

veldev. Liuettin (d), as follows, "If a witness coming to testify in a cause in Middleser, be airested in London by one knowing the cause, he hath no remedy but by habeas corpus to examine and deliver him thereby, but if there be any contempt by the officer &c., an attachment hay be afterwards awarded against him, for they are as well to have privilege as the parties."

Lightfoot does not turn on the form of action, which was trespond and false imprisonment, yet it is there held by the court that that is the proper remedy for a party arrested without lawful authority. Unless the arrest is illegal, there is no personal injury or special damage; and if it is, the imprisonment is a direct and immediate injury, not the subject of an action on the case.

Third point. Even if an action be maintainable, and in this form, the plaintiff cannot recover without proving the "telenter" of the defendant; or a plaintiff who is entitled to issue a writ will be answerable for the officer's violation of privilege in an ill-timed execution of it, or other excess of an authority. The writ had here been first sued out as long before as the 18th April, the this cipils was tested in June, and though the defendant might have had information of the plaintiff's being at Bristot on the 18th of August, before he issued the latter, there is no evidence that he knew of or othered the arrest to be made when it in fact was.

As to the third and last counts, the same arguments apply; besides which, the defendant, as a side clerk of a sworn attorney of the Exchequer, was entitled, on suing out a capital of privilege, to arrest the plaintiff, though an attorney of another court, Walker v. Rushbury (5); Bowyer v. Hoskins (c), cited in Elkins v. Harting (d). Could the defendant be presumed to

⁽a) 1 Keble, 220, Hil. 13 C. 2.

⁽b) 9 Pri. 16.

⁽e) 1 Y. & J. 199

⁽d) Ante, Vol. L. 274.

STOKES

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Waste

know that an attorney retired to Guerneey could claim she privilege of the court as a practising attorney Nor has 2 & 3 W. 4. c. 110. taken away the office sworn or side clerk, though the duties of those office are these varied and apportioned. They are reco nined by 11 G. A. and 1 W. 4. c. 70. a. 10, and a there distinguished from the other attornies made a missible to practise in this court by that act. Nor c the defendant, after qua side clerk arresting, the plan tiff, now say that his own power to do so by capies, privilege was gone at the time. Besides, the write which the arrest took place was merely an alias, or tinning (a) a writ originally sued out by the defendant side elerk, before the act 2 & 3 W. 4. c. 119. [Hey : B. : You say privilege as a side clerk takes, away pri lege as an attorney. It does not appear that eviden was given that defendent knew that the plaintiff was certificated attorney. That knowledge is alleged the third and fourth counts, but was not proved. will only appear from the process that the plaintiff w privileged as an attorney or otherwise at the time the arrest.

The court granted the rule in the alternative prayed.

Cause was shown in Michaelmas term. 1838, by the Solicitor General (Six John Campbell). First, can man who, being by law privileged from arrest, nevertheless imprisoned, be without any remedy for demand many mustained thereby? Neither against the sher who without commence of his privilege obeys the writ (b), nor against the plaintiff who has insued regal process, which is affirmed though the defendant is decharged from it, can be have any remedy in treepose

⁽a) See ante, p. 308.

⁽b) See Parsons v. Loyd, 3 Wils. 345; 6 Rep. 54, as, Doug, 671; S O. Bridg. 386; 3 East, 127; 4 Taunt, 668.

Then if technical objections exist to an action of trespass, the plaintiff having sustained temporal damage from the arrest by being driven to procure bail, &c., may sustain case, Com. Dig. tit. Action upon the Case (A). When Cameron v. Lightfoot was cited in Tariton v. Fisher (a) as a decision that trespass would not lie for an arrest made notwithstanding privilege. Lord Mansfield distinctly intimated that in his opinion case would. Vandeselde v. Lluellyn only shows that as between the officer and the party arrested, the officer is to be protected by 'the writ, and is only punishable by the court for contempt, if he knew that the party was attending under a subporta; nor is a habeas corpus the only remedy, as stated in Keble, for he might sue out a writ of privilege or apply to a judge for his discharge. The personal privilege of the plaintiff as a witness, differs much from that of a party arrested within a privileged place, in which case only the lord of the franchise can sue for its infraction.

"As to proof of the scienter, the jury have found that the plaintiff was under the protection of a subpœna. The defendant's opposition to the plaintiff's discharge 'on the judge's summons, ratified the previous set of the officer in arresting him, and was strong evidence for the 'jury, that the alias was issued against the plaintiff, "knowing that he was subpænaed in a cause at the Bristol assizes. [Bayley B. The defendant might attend before the judge for the purpose of ascertaining there whether the plaintiff remained in Bristol, or had been bond fide waiting there to return by the Guernsey ateum pucket.] Next, the defendant ceased to be a side cherk on 15th August 1832, when the statute 2 & 2 W. 4. c. 110. passed: so that the general privilege of the plaintiff as an attorney to be free from arrest on mesne process, was no longer countervailed by that special

STORES V. WRISE. SCOKES V. WHITE.

mentale mentale delicities are desirable entitle equalities acquired in respect of duties which that cealed and while transferred to other officers: The defendant wit then placed on the feeting of other attornies. 12 Novi was settled in Penrion villenton (a); that though a atterney of Kliff: may sue an attorney of O. P. by attachment: of privilegel he may not arrest and bill kim to bail, and if he does the proceedings will be ut aside as ibregular, with dusts! Walker v. Rushbury (b) and Bowger in Hoskini (c), were decided on mount only; and before the passing of 11 G. 4. & 1 W. 4. c. 70, for the uniformity of process of Lord Lyndburst. Butgar to Mothids was decided expressly on the practice of this court as to the privilege of its clerks in court | By the first cited not no person (eds. no sworn clerk) helding any of the offices mentioned in the act shall arts an attorneys then how can the side clerks, who as sich could only sue in their names, any longer practise?

Kelly on the same side, was heard in this term.

and the second second ., • to be prove office Lord Lynphurst C. B. - Even assuming from the date of the alias that the defendent hoped to find the plaintiff at Bristol about that time, all that he did on that occasion was to lodge the writ with the sheriffs, leaving it to them to do their duty respecting it in a proper manner. He might well have concluded that they would only execute it on the plaintiff, if he det layed his return to Guernsey improperly. As, to the attendances of the defendant's clerk before the judge on the summons, for discharging the plaintiff on common hail, they amounted to no more then attending him on the defendant's part to ascertain whethen facts were stated in the plaintiff's affidavit, which

⁽a) 4 D. & R. 73. (b) 9 Pri. 15.

⁽c) See now 11 G, 4. & 1 W. 4. c. 70. s. 10.

Stores V.

in the judgment of the court were sufficient to establish the privilege claimed. The most atrenuous opposition to the discharge would amount to more more and certainly motito any recognition its affirmance by the defendant of the previous act of the sheriff's officer htuBrisdon Nor did the plaintiff, at the time, of the application south ittlete, remain in actual personal custody, having gisen beil to the sheriff on the 28th of The desendant did mo sat in the interim to keep the plaintiff in custody. : Then if no net of the defendant, in the ament in question, we knowledge (of the circumstances under which its took placts is shown, he was not liable to an action allord Manafield says, in Turleton v. Eisher (a) which her, if the defendants had done any thing copressives with shall nesses of all the circumstances, an action locather taxes might bis maintained, woold be another question yes 200 denother point was made for the plaintiff that his general privilege from arrest was abtuablished this of the arrest in question any longer countervailed by the special privilege of the defendant as a clerk in court. or side clerk of one of the sworn attornies, or clerks of this court wand the statute 2 & 3 W. 4. 2 110. passed 15th Aug. 1832, was cited in support of this atgument! It is intituled, "in act for the better regillation of the daties to be performed by the officers of the pleason common show side of the court of Excilent other bund after reciting the statute 11 Out aftil of W. 4. et 70, for the more effectual administration var justice; and naming two persons as belief clerk and depaty clerk of the pleas, and four others as being wither amoratiolerks in the and is could be a supplied in the ceeds to state that the deputy clerk of the william and whereald four sworn clerks "have conducted and pelsermed whele business of the billies of the blest

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or common law side since the passing the act of l G. 4. and 1 W. 4. c. 70., but without any regulation to the respective duties to be performed by each. then goes on to apportion those duties among the befor named individuals. But the effect of this act is not! abolish the offices of sworn or side clerk, or to tal from any of them, whether named in the act or no any privilege which they had before it passed, are touched by it in no other manner except that consequence of it they, as side clerks of this cour have no duties to perform, though their offices as suc continue to exist. By the acknowledged course of the court (a) side clerks or clerks in court (viz. clerks of the four sworn clerks), and practising in their names, mist arrest attornies of other courts by capies of privilege The side clerks, in the causes which they conducte themselves, performed their duties in the name o the sworn clerks: whereas now the duties of the latter are performed by the same individuels it their character of officers of the court, designates and appointed by the act 2 & 3 W. 4. c. 110. Sec tion 30. enacting that no person holding any of the said offices, or being an assistant or clerk to any o them, shall act as an attorney, is directed against the new offices. Now a side clerk practised in the name of one of the four sworn clerks or attornies. fendant's first writ of capias was sued out accordingly before the passing of 2 & 3 W. 4. c. 110, so that the alias issued afterwards was only following up his previous proceeding (b). It was the side clerk's privi lege, as well as that of the sworn clerk, so to sue, though the mode of instituting the suit was in the name of the

⁽a) See Baron Hullock's judgment in Bowyer v. Hoskins, 1 Y. & J. 203.

⁽b) N. B. Both writs of capies were issued before the 2 Will. 4. c. 39. s. 1. the uniformity of process act, came into operation.

sworn clerk. The sworn clerks, as such, still exist as officers of the Exchequerof Pleas, and consequently the side clerks also, with their privileges. The side clerks are therefore entitled to practise without being admitted attorneys of the court; whereas by 11 G. 4. and 1 W. 4. c. 70. s. 10. attornies of other courts must be admitted here before practising in it. The sole object of the framers of the act 2 & 3 W. 4. c. 110. was not that the offices of sworn clerks should be abolished, but merely that the several duties to be performed by them in their new characters of master and prothonotary, clerk of the rules and filacer, should be precisely regulated and apportioned among them. Their several privileges as sworn clerks are preserved as well as their former official duties as such, but the latter are allotted among them by the act.

PARKE B .- In order to make the defendant responsible in this action, the plaintiff was bound to establish that his imprisonment took place by the act of the defendant, and that the defendant knew the plaintiff to be a practising attorney, and as such, privileged at the time; for his privilege only exists with reference to his constantly attending in the courts. Even assuming that an action on the case would lie, it could not, at all events, be supported, unless by showing that the defendant had knowledge of the circumstances of the arrest at the time it took place, and ordered it to take Subsequent recognition or affirmance of it, would not suffice. Now the declaration avers, that the defendant well knowing the premises caused the plaintiff to be arrested and imprisoned. Neither the scienter or the other averment have been proved. There is no period of time when any act is done by the defendant ordering the plaintiff to be imprisoned,

BTORES
WHITE.

STOKES
v.
WHITE



with knowledge of the circumstances of the a For it is too much to say, that one man, b posing the application of another to be disch from an arrest, thereby orders him to remain i tody, even if successful in that opposition. the stat. 2 & 3 W. 4 c. 110. I am of opinion side clerks remain as they did before, and continue to act as attornies in this court, but not practise in the name of sworn clerks, who a qualified by section 3 from acting as practitioners though sect. 10 does not mention side clerks in cular, it never could have intended to exclude from practising altogether, which would be the of the argument for the plaintiff.

BOLLAND B. concurred.

ALDERSON B.—The plaintiff sent down the value the sheriffs; they arrested the plaintiff under ambicircumstances, and a motion for the defendant charge on common bail was afterwards made with cess. Then is the plaintiff, for their mistake, liable to an action on the case for having knowing casioned an injury to the plaintiff by malice an pression?

Rule absolute to enter a nons

with knowledge of the circumstances of the arres-DANIEL HERRING and infant, oby Windbokinger this posing the application in the application of the principal point of the application of th from an arrest, thereby orders him to remain in cu-TRESPASSifer, assault and Lake imprisonment for Where the init 20 days, by means whereof the plaintiff not only master of a school refuses was prevented from seeing this family or friends, shil to deliver up from having many differdousse tor; communication mith a boy to his them; but was also thereby found and philipsdiand did parent, on acnedessarily, payarday, outstand, on pending langer, same of quarter's manayarto, wit stew in and nahout she obtaining and schooling not having been couting, and procuring an writ of habous corpus to be paid according insted aut of this majesty's court of King's Barch of but there is no Westminster, in order from processe his hipprestion, and evidence that discharge from such imprisonment as aforesaid, and present at the other wrongs &c. Plea: general issue. The plaintiff, refusal, or a boy about 11 years old, was sent to the defend- mother had autis, academy at Stockwell by his mother and without him home and The terms of the school were 20 guiness a year (pay, been refused, able quanterly, in advance. The boy went at Michaels any way remas, but the quarter was not paid in advance and on strained 24th December his mother called about ning in the school during evening, asking to take him home for a few days. The the Christmus formight; an defendant, said, he was in bed; and would not permit action for her to see him, saying, he would not let him go home ment cannot till the quarter was paid ... On Blat December she paid be maintained the quarter due in advance at Michaelmas. On 2d Jamuary she again called at night, and asked to take away her son; but the defendant told her he was in bed, would not let her see him, and declined to let him go till the price of his board and tuition for the fresh quarter which had been entered on should have been paid. The boy having been again formally demanded, the defendant refused to let him go, unless compelled by law. On the 11th January defendant



the person of count of a to contract, the boy was knew that his though kept at false imprisoni

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1884.

IIERRING
v.

BOYLE.

was served with the copy of a writ of habeas corpusand delivered up the boy. The plaintiff did not so his mother on either of the occasions when she called to take him home, nor was he aware that she had called for him.

At the trial before Gurney B. at the Middless sittings, the plaintiff was nonsuited for want of endence of imprisonment.

Comyn, in Easter term, obtained a rule nisi is setting aside the nonsuit and having a new trial against which

Hutchinson now showed for cause, that there we no proof of any violence or forcible detention by the defendant, of the boy's person against his will, or even that he knew of her visit. Vi et armis et contracem were not proved. The court then called on

Comyn and Butt to support the rule. There w evidence to go to the jury, from which they migh have presumed a detention and imprisonment of the boy against his consent. It was not necessary to prov an actual assault or violence used to him, for in cor templation of law, every detention against a person will includes an assault. Thus, locking the door of room where a supposed lunatic is, would give him, an him only, the right of suing for false imprisonmen So where a gaoler does not liberate a convict after h term of imprisonment is ended; and yet the latter me be ignorant when it expired. It must be conceded, the the plaintiff originally assented to be placed at th defendant's school by his mother, because the la would presume his assent to what was apparently for his benefit; but as there is no evidence of the boy'

1884.

consent, the presumption of his consent in fact ended when his mother, a widow, who had the right not only to control and direct him, but to the possession of his person at his early age, determined that contract for his board and education, under which only he remained at the school. For any unnecessary expense sustained by her from the plaintiff's misconduct, it seems that she might have sued in case (a). After this, the boy being formally demanded on her behalf, the defendant declares he will not give him up till compelled by law, and only relinquishes his custody of him after the issuing a Then in the absence of direct evihabeas corpus. dence of the boy's assent or dissent to being detained, the declarations of the defendant were evidence for a jury to find, that he detained the boy not for the original and lawful purpose of educating him, but till a sum of money could by that means be wrung from his relative. It was not necessary to prove that the boy expressed a wish to go, and had he wished to stay, the defendant might have proved the fact; nor has he pleaded a licence. It should have been left to the jury, whether detention during the usual period of holidays, was not against the boy's will. [Alderson B. Your argument assumes, that as a detention is presumed to be against the will of the party, every boy at school is kept in imprisonment there, though by the authority of his parents. If that is not a fallacy, the deduction you would contend for follows; viz., that when that authority is at an end, his remaining at school might be an imprisonment. But was it not incumbent on you to show that the plaintiff remained at school against his will; and is there any evidence of that fact? A habeas corpus may be granted, to obtain the custody of an infant, who can exercise no will of

⁽a) See Hall v. Hollander, 4 B. & Cr. 660.

HERRING
v.
Boyle.

Bolland B. The defendant is not prove its own. to have any communication or contact with the plain tiff, at the time the mother called. Alderson B. Th presumption that every grown man under restraint i presumed to be so against his will, may exist in th case of a lunatic; but is rebutted in the case of school-boy, on account of the necessary object of hi education. In trespass for criminal conversation, th constructive assault on the wife being supposed to b against her will, is unlawful; whereas here it is lawful You admit that had the boy's consent to stay at school appeared, no action could have been maintained; the shows the will of the mother not to be, quoad hoc, the will of the child. The plaintiff was bound to show distinctly the dissent of the child.]

Bolland B.(a) As this case was moved before my Lord Lyndhurst and my brother Parke, we will mention it to them, though we entertain no doubt on it.

Cur. adv. vult.

On a subsequent day Bolland B. said, The question in this case was, whether or not this action was sustainable under the circumstances proved? Am as it did not appear from the judge's notes, that any evidence of a false imprisonment had beer given, which could go to the jury, I am of opinion that the rule for setting aside the nonsuit must be discharged. It was put to the court in argument that the misconduct of the master in refusing to give the boy up to his mother when demanded amounted to a constructive imprisonment of the boy; but there was no evidence that he was aware of any restraint or refusal to let him go, or even knew

⁽a) Lord Lyndhurst was sitting in equity, and Parke B. at nisi priss.

1834.
HERRING
v.
BOYLE.

what was going on respecting him. Many authorities establish, that a constructive imprisonment may take place without actually touching the party, as if a bailiff enter a room, and tell a person he arrests him, and locks the door (a); but I find none which extend that doctrine to a case where the party is not shown to be corporeally present at the time of the defendant's act. No evidence is given of any refusal or unwillingness on the part of the boy to stay where he was; he may have been all along willing to stay; nor that the master ever stated in the boy's presence, his refusal to let him go. Then the boy cannot be said to have been imprisoned against his will.

ALDERSON B.—In the total absence of all evidence that the boy knew of the master's refusal to let him go, the rule must be discharged. He was not shown to be cognizant of any restrain!, and the defendant's refusal in his absence to deliver him to his mother, does not, in my opinion, amount to a false imprisonment.

GURNEY B.—There was no evidence that he even knew of his mother's visit, or that she had requested that he might return home, which the master had refused, much less that he was restrained, or conscious that he was so in any degree.

LOTH LYNDHURST C. B. added,—I am entirely of the same opinion, as is my brother *Parke*. We both heard the motion for a new trial, though absent at the argument on showing cause.

Rule discharged.

⁽a) See Cas. temp. Hardw. 301; Arrowsnith v. Le Mesurier, 2 New R. 211, 212; also Perry v. Adamson, 6 B. & Cr. 528; Bates v. Pilling, ante, 231.

1834.

Wasney, Clerk, Executor of Ann Andus, against Earnshaw.

Where an executor agrees with a legatee to allow him interest on his legacy if he will permit it to remain in his hands, it becomes a loan to the executor, for which he is personally liable at law, and cannot plead plene administravit in bar to an action by the legatee.

The fourth count of the declaration SSUMPSIT. stated, that whereas heretofore and in the life-time of the said Ann Andus, and before the making of the promise of the said defendant hereinafter next mentioned, to wit, on 25th March 1817, to wit, in &c. one Thomas Earnshaw made and published his last will and testament in writing, and thereby, amongst other things, nominated and appointed the said defendant sole executor thereof, and thereby, amongst other things, devised and bequeathed to the said Ann Andus the sum of 100l. And the said Thomas Earnshaw afterwards and before the making of the promise hereinafter next mentioned, to wit, on &c. in &c. died, without altering or revoking his said last-mentioned will. And the said defendant afterwards and in the life-time of the said Ann Andus, and before the making of the promise hereinafter next mentioned, to wit, on 24th March 1820, proved the said will, and took upon himself the burthen of the execution thereof, and then and there assented to the said last-mentioned bequest to the said Ann Andus, and afterwards and after the proving of the said last-mentioned will by the said defendant, and after the payment of all the debts of the said T. Earnshaw, and all the other legacies in the said will mentioned, there remained in the hands of the said defendant, as executor as aforesaid, a sufficient sum of money, being assets of the said T. Earnshaw, wherewith the said defendant, as such executor as aforesaid, could and might and ought to have paid the said last-mentioned legacy of 100l. to the said Ann Andus, and before the making of the promise hereinafter next mentioned. to wit, on &c. in &c. assented and agreed that the said

Ann Andus was then and there entitled to demand and have of and from the said defendant, as executor as aforesaid, the said legacy of 1001. according to the lastmentioned bequest of the said T. Earnshaw, to wit, in &c. And thereupon afterwards, to wit, on 25th March 1821, to wit, in &c. in consideration of the premises, the said Ann Andus, at the special instance and request of the said defendant, suffered and permitted the said defendant to retain in his hands the said last-mentioned sum of 100l, so due to the said Ann Andus as aforesaid. and then and there lent him the same, upon the terms and conditions that the said defendant should pay the said last-mentioned sum of 100l. to the said A. Andus on request, and in the meantime should pay and allow her interest on the same at and after the rate of 51. for the year, and the said defendant then and there had and retained the said last-mentioned sum of 100%, in his hands upon the terms last aforesaid, from thence until and at the time of the death of the said Ann Andus, to wit, And thereupon afterwards and after the death of the said Ann Andus, to wit, on 11th April 1833, &c. in &c. in consideration of the premises, and that the said plaintiff, as executor as aforesaid, at the special instance and request of the said defendant, would permit and suffer the said defendant to retain in his hands the said last-mentioned sum of 100%, he the said defendant then and there promined the said plaintiff, as executor as aforesaid, to pay him the said last-mentioned sum of 100% on request and interest thereon in the meantime, at and after the rate of 51. by the year. Averment, that the said plaintiff, as executor as aforesaid, did afterwards, to wit, on &c. in &c. permit and suffer the said defendant to retain in his hands the said last-mentioned sum of 100%. upon the terms aforesaid; and although the said de1884. Washey v. Earnshaw.

ing &c., but intending to deceive the executor as aforesaid, in this respect would, when he was so requested as : any time before or since, pay the said pl as aforesaid, the said last-mentioned any part thereof, or any interest for the thence hitherto hath wholly refused so sufuses to pay the same, or any part the plaintiff, executor as aforesaid, to wit, i The 5th count stated, that in cor the said plaintiff; as executor as aforesaid the defendant to retain in his hands sum of 1604, which the said defendant deived for the use of the said Ann An time, as part of the personal estate of th show deceased, and which the said T. bequeathed to the said Ann Andus in and would lend the same to the said defi mised the plaintiff, as executor as afore said sum of 100% upon request, with 1 and the said plaintiff did permit the sai netain in his hands the said sum of 100 and there lend the said defendant the terms last aforesaid, and although the was afterwards, on &c. at &c. request plaintiff as avocutor as aforesaid to --

The point to be contended by the plaintiff was, that as the defendant was sued, not as executor but in his personal capacity, the plea of plene administravit was bad in law.

1824. Wasney v. Earnshaw.

Granger for the plaintiff cited Gregory v. Harman (a) in support of the demurrer.

The Court then called on

Hoggins to support the plea. The declaration is bad, as there is no legal consideration laid for the promise; and secondly, the defendant's assent to the legacy, as executor, and his promise to pay it, are evidence of assets only, so that the plea of plene administravit is good, and plaintiff should have taken issue on it, and proved the assent and promise to pay. even if this is a loan of money, such a loan by retainer is not a consideration for the promise, or laid as such. After stating the assent to the legacy, the declaration states, that in consideration of the premises the plaintiff permitted the defendant to retain the money, and then lent him the same. [Lord Lyndhurst C. B. It is " in consideration of the premises," that is, of what is there before stated, and upon the terms and conditions that the money lent should be repaid on request.] Then there are two considerations and two promises. [Lord Lyndhurst. That is right in form; the promise to pay is first laid to Ann Andus, and after her death to the plaintiff as her executor. A loan is distinctly averred. If A. has money of mine in his hands, and I say that

⁽a) 1 Moore & Payne, 209: and see William Bane's case, 9 Rep. 93; Davis v. Reyner, 2 Lev. 3; 1 Rolle's Abr. 24, pl. 33; Goring v. Goring, Yelv. 11; Davis v. Wright, 1 Vent. 120; Trewinian v. Howell, Cro. El. 91; Quick v. Copleston, 1 Sid. 242; Reech v. Kennegall, 1 Vez. 223.

WARNEY U.
EARNSWAW.

he may retain it, allowing me 5 per cent for it, the transaction is valid as a loan. The mere fact of the money remaining in the party's hands does not also a loan, but if he retains it at interest in respect of contract, it is different. Here it remains by virtue such a contract. "In consideration of the premius refers to all the antecedent matter, vis. that Earnels had money to pay all the legatees, and, having put them all except this legatee, had money after that a maining in his hands. It is a contract that the exect tor should retain the legacy, paying 5 per cent interest and he did retain accordingly, under contract a lending it to him.]

In the first part of the count no loan of money stated on the pleadings, and the promise is not laid to be in consideration of any loan, but in consideration that Ann Andus was entitled to demand the legacy the loan being merely an act done in consideration the premises on which the promise is raised; the latter part of the count merely means that the legates well permit the 100% legacy to remain in the defendant hands.

Lord LYNDHURST C. B. —When Asse Andre die she had suffered the defendant to retain it under the contract between them, and the defendant did retain according to that contract. That is a loan. It would be sufficient if it had been said that in consideration that Ann Andre would permit the defendant to retain money on certain terms, one of which was that he should pay 5 per cent. for it, that would be a special contract.

Judgment for the plaintiff (s).

⁽a) See Gleadow v. Atkin, ante; Vol. II. 593;

1834.

PEPPERELL against BURBELL.

A Rule had been obtained by Follett, for setting aside An order havan interlocutory judgment for irregularity, in sign- ing been made ing it before the time for pleading had expired. order for seven days' time to plead was made 15th May, granted on 15th May, the the pleas were delivered on the 22d, and judgment defendant, on was signed at the opening of the office on the evening vered pleas of that day.

Hutchinson showed cause. The judgment was re- wards signed judgment on gularly signed, for two reasons; first, the pleas were the same day, delivered out of time on the 22d, time to plead un- day, exclusive der a judge's order being to be reckoned inclusive of of that on its date, and exclusive of the day it expires; Kay v. order was Whitehead. (a) And Gould J. there cited from a MS. granted. The note, Read v. Montgomery, C. P. Easter, 26 Geo. 3., the judgment where an order for time to plead having been made as signed too soon on the en 16th May, a judgment signed on the 23d, for 22d the dewant of a plea, was held regular, on consulting fendant having all that day in the officers. Freeman v. Jackson (b) is not contrary, which to plead Secondly, the judgment might be signed on the 22d, a regular plea. Seven days' as for want of a plea, on account of the irregularity in time for pleadpleading two pleas without leave of a judge, pursuant whole of the to Reg. Gen. Trin. 1831, [ante, Vol. I. 533,] and for seventh day to want of signature of counsel to the second, which excluding the concluded with a verification. The defendant's deli-day on which the order is very of the pleas within the time allowed by the order, made. dispenses with the time otherwise required before signing judgment.

Follett in support of the rule. By Reg. Gen. Hil. # W. 4. No. VIII. [ante, Vol. II. p. 352,] the seven days not being expressed to be clear days, are to be

(a) 1 B. & P. 480.

(b) 2 H. Bla. 35.

for seven days' An time to plead, granted on the 22d, deliwhich were irregular. The plaintiff afterbeing the 7th which the court set aside

ing, gives the plead in, after PEPPERBLL v.
BURRELL.

reckoned exclusive of the first, and inclusive of the last day. Then the judgment was signed too soon of the 22d, the defendant having all that day to delive his pleas in; and even if the plaintiff might have signe judgment for the irregularity pointed out, the plaintiff should not have signed it till the 23d; and had have ted till the proper day, the defendant might have got an order to plead several matters, and delivere another second plea regularly signed.

Lord Lyndhurst C. B.—I accede to the position that the defendant had the whole of the 22d on which to obtain a judge's order to plead several matters, and to deliver a good plea signed in the regular way; whereaby the plaintiff's signing judgment on that day, the defendant was prevented from doing so; therefore at the judgment was signed too soon, it must be set aside.

ALDERSON B.—The plaintiff might have cured the integral arities of his pleas, if he had not been forestalled by the plaintiff's prematurely signing the judgment.

The other Barons concurring,

Rule absolute.

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Lamos Alter.

MACHEB against BILLING.

A defendant who had obtained a rule for setting aside a interlocutory judgment for irregularity, with cost plead, and The defendant's order for seven days time to plead afterwards an order for particulars of plaintiff's demand, delivered a plea not signed by course though concluding with a verification three days before the time for pleading pired. The plaintiff treated the plea as a nullity, and signed judgment the day before that on which the time for pleading expired: Held, that as the defendant had all that last day for delivering a plea signed by coursel, the judgment was signed too soon.

was dated 31st October, and did not expire till the 7th November; on the 3d November he obtained an order for the plaintiff to deliver particulars of demand, which by the practice gave him as much more time to plead, as he then had; vis., four days more after the 7th(a). But on the 8th, the defendant, without obtaining an order to plead several matters, idelivered a plea of the statute of limitations to the first count of the declaration, and the general issue to the residue of the causes of action in the declaration. The plea of the statute was not signed by counselve On the 10th the plaintiff signed judgment.

MACHER v.
Billing:

Chilton showed cause, that the defendant, by delivering his pleas, had waived the surplus time which he had to plead in, and that no order of a judge to plead several matters had been obtained; and that the plea of the statute of limitations was not signed by counsel.

plea, requiring an order to plead several matters; a plea of defendant's bankruptcy requires no signature of counsel (b). [Parke B. It concludes to the country, which distinguishes it from this plea of the statute of limitations, which concludes with a verification. The case however is not specifically provided for by Reg. Gen. Hil. 2 W. 4. No. 107. [ante, Vol. II. 350.] The officer

Bazett in support of the rule. This is not a double

heing out till the 11th, he would have had the 10th and all the 11th to deliver a plea signed by counsel, had not the plaintiff signed judgment on the 10th. He cited Pepperell v. Burrell. (c)

certifies to us, that the plea of the statute required signature.] The defendant's time for pleading not

1 20-11-11

⁽a) 13 East, 508; 4 B. & Cr. 970; Tidd, 9th edit. 469.

⁽b) 6 T. R. 496; 1 Chit. R. 225.

⁽c) Ante, p. 809.

1884. MACHER Billing,

Lord Lyndhurst C. B.—That case seems precisely applicable. It is material that there should be a uniformity of proceeding on such a point; we will inquite the course of the other courts.

The judgment of the court was thus delivered the next morning by

PARKE B.—A discrepancy has been supposed to exist between the practice of the King's Bench and of this court, on the point whether, a bad or inegular plea, pleaded within the time allowed for pleading, could be treated as a nullity, so as to entitle the plaintiff to sign judgment immediately. Two old cases in the King's Bench show that such a plea might in that court be treated as a nullity, whilst Pepperell v. Burrell(a) was decided in this court a contrary way in last term. We think that that decision of this court is the right one; and consequently that the judgment in this case was signed too soon.

Rule absolute.

(a) Ante, p. 809. This case was decided in Michaelmas term 1834, but having confirmed Pepperell v. Burrell, is placed next to it.

PHILLIPS against Ensell.

Where it is sought to set aside a declaration and all subsequent proceedings on an affidavit of defendant that he was not personally

ADDISON moved to set aside the declaration and subsequent proceedings with costs for irregularity, in not having personally served the writ on the defendant. He stated, first, that the defendant had not been served with the copy of any process; and secondly, that the declaration was served too early.

served with process, and of his brother who lived in the house, that the writ was served on him by mistake on two occasions, the proceedings will stand unless it is sworn for the defendant that the copy served did not reach his hands, or come w

his possession, or was not shown him by his brother.

seme house, swore that he never was served with any copy of a writ of summons. His brother, who lived in the same house, swore that a copy of the writ was served on him on the 20th May, and that he immediately sent it back by the post to the plaintiff's attorney, informing him that he had had no conversation with the defendant about it. A copy was again served by the same person on the brother on 23d May, when defendant was in bed. The declaration was delivered on 31st May. Thomson v. Pheney (a) having been cited, Parke and Alderson Bs. severally dissented from it as being contrary to their experience in K. B. and C. P., and the latter mentioned Rhodes v. Innes (b). A rule having been granted in order that the question might be considered,

PHILLIPS

O.

EMBREL.

Hutchinson showed cause. The defendant, who resides in the same house with his brother, does not swear that the copy never came to his hands on either occasion, or that he had no notice of either of the services which was mistakenly made on his brother; nor does the brother swear that he did not acquaint his brother of the second service on himself. The defendant's personal knowledge of a writ is, for the purposes of this species of service, equivalent to personal Thus, in Rhodes v. Innes it was held that service. service on the son who said his father was in the house. and should receive the process, was sufficient, the father having then been long eluding the writ. [Alderson B. Nothing shows that the copy ever reached the defendent. If the affidavit on which this judgment was signed was not in the ordinary form, stating personal service on the defendant, he should have showed it was not, and he not having done so, it must be presumed to

⁽a) 1 Dowl. P. Cas. 441, Patteson J.

⁽b) 7 Bing. 329.



be in the ordinary form. the brother delivered the can personal service be c was regular, having been of first service on the 20th.

Addison supported the 1 service shown by the plaint it never took place. Gur with the brother's affidav sent the first copy servet torney he had showed it to Phency (a) is a stronger ca of the writ was left in th though the defendant wa hearing, the service was h sonal, [Alderson B. Ther is no service," and I should what he refused to do.l service must have been info the son. [Alderson B. In was an affidavit denying p by the second service th abandoned the first, and that personal service took j occasion. If so, the declara

BOLLAND B.—I conferm as to the case of *Thomson* cation on special affidavits whether the service in the enable the plaintiff to enter fore, as that case dees not a v. *Innes* in the full court o service was held sufficient, and, upon that authority, I think this rule ought to be discharged.

1884. Рякцыря v. Емяры.

ALDERSON B .- I am also of opinion, on the authority of Rhodes v. Innes, that this rule should be discharged. In both cases affidavits are made denying personal Even if the personal service intended to be service. made by the person employed for that purpose, had never taken place, yet the appearance impst, have been entered by the plaintiff, for the defendant under the statute 12 Geo. 1. c. 29. on the usual affidavit of personal service on the defendant, now he does not swear, on the other hand, that the process has never reached him or been in his possession. We think his affidavit, that he was never "personally, served!" with it, does not counterbalance the usual affidavit for the plaintiff. Rhodes v. Innes may be distinguished from Thompson v. Phoney, for in the latter case it is not improbable that the copy did not reach the defendant. But if no such distinction had existed all should have adhered to the rule laid down in Rhodes v. Innes by the court of Common Pleas, and have held this to amount to personal service. in the the second

GURNEY B.—We entertain no doubt that the service on the 20th, the first occasion, was sufficient. As the defendant does not swear he did not get the copy, it must, I think, be taken that he did.

 1864.

Duncan against Grant.

Where any plea is pleaded . besides the general issue, a notice of setoff will not enable the defendant to give in evidence the matters of his set-off under 2 Geo. 2. c. 22. s. 13. without pleading it.

DEBT to recover a sum of 4l. 10s. Pleas: nil debet as to all but 1l., and a tender of that 1l., with notice of set-off for 3l. 10s. money lent, and the statute of limitations; 1l. was paid into court. At the trial before the under-sheriff the tender was admitted, but it was objected for the plaintiff, that as there was no plea of set-off, no items of set-off could be proved for the defendant. Here, there was another plea on the record besides the general issue. The under-sheriff having directed a verdict for the plaintiff, a rule was obtained for a new trial on the ground of misdirection and rejection of evidence.

Walesby showed cause. In Webber v. Veik (s) Abbott C. J. said, "It ought to be generally known that where any plea is on the record besides the general issue, the set-off cannot, by the terms of the statute 2 Geo. 2. c. 22. s. 13. be taken advantage of, unless pleaded."

C. Jones contra. In the previous case of Coulina v. Jones (b), Lord Ellenborough heard counsel on both sides, and referred to the statute; after which he was of opinion that there were no restrictive words in it confining the right to give a notice of set-off to the case where the general issue is pleaded alone, and that where the general issue was pleaded with different pleas, the defendant might give evidence of set-off under a notice of set-off. In Webber v. Venn, the event did not turn on this point.

BOLLAND B.—In determining the weight of the conflicting authorities, I am inclined to accede to Lord

(a) Ry. & M. 413.

(b) 6 Esp. 50.

IN THE FOURTH YEAR OF WILLIAM IV.

Tenterden's opinion, as being at once more consistent with the words of the statute, and not likely to have been expressed by him in the manner it was, had he not formed a deliberate opinion on the subject contrary to that of Lord Ellenborough.

DUNCAN

O.
GRANT.

ALDERSON B.—It is probably better to adhere to the latest authority on the point. The words of the act 2 Geo. 2. c. 22. s. 13. are, that where there are mutual debts between the plaintiff and defendant, or if either party be sued as executor or administrator where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, " so as at the time of his pleading the general issue" when any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due or otherwise, such matter shall not be allowed in evidence upon such general issue. Now the fair meaning of the clause taken together seems to be, that when the general issue only is pleaded, the matters of the set-off may be given in evidence on a notice; but that if any special plea is pleaded, the set-off must also be pleaded. I therefore think Lord Tenterden's opinion the best founded.

GURNEY B. concurred.

Rule discharged.

1834.

GREGORY against TUFFS.

A new trial will be ordered after a the jury find their verdict evidence in a cause on a misapprehension of the law, whether arising from their own mistake or the misdirection of a judge.

DEBT on 25 Geo. 2. c. 36, s. 2. (made perpetual by 28 Geo. 2. c. 19.) for a penalty of 1001. for keeping verdict for the an unlicensed room for public dancing and music. At quenciant in a penal action, if the trial before Lord Lyndhurst C. B. at the Middlesex sittings after last Michaelmas term, it was proved against all the that the defendant kept a public-house in East Smithfield, and that on repeated occasions, during a space of three or four months, the tap room was frequented at night by numbers of sailors, soldiers, boys and prostitutes, who danced there to a violin played by a person on an elevated platform. It did not appear that money was taken at the door. The plaintiff's witnesses were paid six shillings per day to obtain the evidence necessary to support his case, but were not contradicted in any particular. The learned chief baron told the jury that a mere temporary or occasional use of the room for music and dancing would not be a keeping it within the act, but that it was not necessary for the plaintiff to prove that it was used exclusively for those purposes, or that money was taken at the door.(a), He left it to them whether the room in question was "kept" for public dancing; adding, that the plaintiff; witnesses, who might have been contradicted but were not, had sworn to facts which, in his opinion, amounted to a breach of the law. The jury, before giving their verdict, were furnished with a copy of the act 25 Geo. 2. c. 36., whether by consent of both sides, or after the chief baron and counsel had retired, did not clearly appear at the time of moving for a new trial. The verdict was for the defendant. Follett, in Hilary term, moved in this case (b) for a new trial, on the

⁽a) Archer v. Willingrice, 4 Esp. 186.

⁽b) Also in Gregory v. Taverner, tried before Gurney B. at the same sittings, with a like result. The jury had obtained the act after retiring.

1834.

GREGORY

v.

TUFFS.

ground that the verdict was contrary to the direction of the judge in point of law to all the evidence. [Lord Lyndhurst C. B. Whether the verdict was contrary to law or not, would depend on the facts which were incontrovertibly proved. Bayley B. After a verdict for a defendant on a penal action, a new trial will not be granted, though the verdict is against the evidence, unless the judge misdirected the jury in point of law; Brooke q. t. v. Middleton (a). The courts have for this purpose considered penal in the light of criminal proceedings, except in the cases of quo warranto infor-Lord Lyndhurst C. B. In Brooke v. mations (b). Middleton the court were inclined to grant a rule, but thought they had no power to do so, recognizing Fonnereau v. Bennet (c), where it was said that the rule had been laid down for fifty years past not to grant new trials in actions on penal laws, where the verdict was for the defendant. The ground here taken is, that though there was no misdirection of the judge in point of law, the jury took on themselves to decide, not on the facts but on the law, under an erroneous idea of what it was. Now one particular benefit of trial by jury is, that they have authority to decide the fact, subject to the direction of the judge in point of law, in order that if he misdirects them, his error may be afterwards set right; but there could be no security for the rights of parties if juries were permitted to take on themselves to decide on the law. Alderson B. They are judges both of law and fact, when mixed together. Lord Lyndhurst C. B. Had they been questioned whether their verdict turned on their disbelief of the witnesses, or on their construction of the act of parliament, and they had rested it on the latter, the principle of

⁽a) 10 East, 268. (b) Rex v. Francis, 2 T. R. 484.

⁽c) 3 Wils. 59, A. D. 1770.

822

1884.

GREGORY

U.

TUPPS.

Breoke v. Middleton would apply, and the case would be analogous to a misdirection. There is some evidence to show that their verdict proceeded on a misapprehended construction of the act, with which, perhaps, they should not have been furnished. If we were quite satisfied that they could only have found their werdies on the point of law, we might interpose.]. The judge was bound to put a construction of law on the statute, and the jury to take it from him as such. It is not easily reconcilable to reason why a jury should have different functions in penal from other actions.

Platt showed cause. If the jury disbelieved the winnesses, then, though bound to take the law from the judge by way of exposition, they could not apply it to facts which in their view did not arise.

Follett in support of the rule mentioned Rer v. Sutton(a).

Lord Lyndhurst C. B.—It is clear from Wilson v. Rastall (b) and Calcraft v. Gibbs (c), that where on the trial of a penal action there is a mistake in the judge's direction in point of law, a new trial may be granted. The only ground for a new trial in this case would arise, if the court, under all the circumstances, should arrive at a clear conviction, that the jury have by an act of their own misapprehended the law on the subject. Assuming that to be satisfactorily established as a fact, there appears no difference in principle between a case which has had an erroneous result in consequence of a mistake of the jury in point of law, and one in which it has been occasioned by the like mistake of a judge. In this case we at first inclined to refuse the rule, thinking

⁽a) 5 B. & Adol. 52. (b) 4 T. R. 753. (c) 5 T. R. 19. 3 T. B. 533.

the verdict had been found only on the question of fact submitted to the jury, but an affidavit has been produced that they obtained the act of parliament after they had retired and received my direction in point of law. The general question is therefore raised, and we will lay down no rule which may be considered new without consulting the other judges. It is clear we could not grant a new trial on the ground of the jury's misapprehension of a fact; but on their mistake in point of law, if well established, we may. First, we must be satisfied that the verdict was founded on misapprehension of law, which is a question for this court. Secondly, if so satisfied, we shall consider whether we ought to grant a new trial in a penal action, and on this latter point we will consult all the judges.

On a subsequent day the judgment of the Court was thus delivered by

Lord Lyndhurst C. B.—It has not been usual for courts of justice to grant a rule for a new trial in penal actions, where a jury has found a verdict for a defendant on a question of fact, but new trials have been ordered in such cases, where there has been misdirection in point of law by a judge, because the jury had been misled in point of law. In the present case we are satisfied as well from the clearness of the facts as from what took place with the jury, that their verdict was founded, not any misapprehension of the fact, but of the law. We have conferred with the judges of the other courts, who consur with us in the principle which I have stated.

Rule absolute for a new trial.

Same rule in Gregory v. Tuverner.

GREGORY
v.
Tupps.



HARLI 01,100

A local bct directed that no person should be capable of "acting as a commissioner in execution case wherein he should be personally interested in the matter in question," and that any person who should so act as a commis-

fied, should forfeit 100l. The commis-

sioner, being

so disquali-

so a faorpath of flag stores ofth with a four-inch ket guiblind On A fire troops and ic whole line of whark or EBE JODA & George Cat

The of 1094 of The declar and hefore and at the time na ai commissioner as berait of Lincols and county of it thereof, in any was to commissioner for car hereinefter mentionedTo RAth Aufr, 1833, in, the ci missioners for serrying into ment ipassed, 2, Gev. 14. paving lighting watching Lincoln and the Bailand C of Lingola, and for regulat

and there held at the Guil

it was then and there orde sioners were will out to the outrain a part elected by parishes within a certain precitiem for constructing a robbway along the frontia premises in a particular manner, Tan desenda commissioner, attended at a special meeting of t to rescind the order to the secupe the bounder motion being made to alter the order, by adopting he supported the proposition in a speech, and to and in opposing the brightal order to the mater procommissioners. In an action of debt for the per-defendant with alting as a commissioner in a terested, and voting suppordingly: Amother pour such commissioner in a matter in which he we found that the defending that flot which he of verdict. Held, that he did not act as a commist the order, except as to his own premises, but it "acted" as a commissioner by addressed the me order, and by taking an active part in the discus-left to them was, whether he had voted, and he missioner in any paper thannet, he was entitled to The evidence of a person who proceeds to a be personally took in it. Stilling 1001 (1860) Och in

Semble, the addressing commissioners of paris of a grievance affecting him individually, is not a grievance affecting him individually, is not a grievance affecting him individually.



tending the said meeting, "that a footpath of flag stones of two flags or four feet in width, with a four-inch kirb on the outer edge; be made in front of the buildings, yards and premises along the whole line of wharfs or reads on the east and north sides of Brauford, with Mount Sorred crossings of the same width, to the gateways, lanes, and openings, and that the necessary nothe be given to the occupiers." And the plaintiff that at the time of making the last-mentioned brder, and from thence, until, and at the time of the descendent's acting as a commissioner as hereinafter mentioned; her the defendant was the occupier of deritain premises, that is to say, certain yards and buildings on the north side of Brayford, and then and there being within the jurisdiction of the said tity and lying before and adjoining the said line in the said order mentioned, the same line being then and there a public place, also within the jurisdiction of the said act, and as the occupier of such premises, he the defendant was, during all the time last aforesaid, one of the occupiers in the said order mentioned, subject, according to the said act, to make part of the said footpath, and also one of the occupiers mentioned in the proposal hereinafter mentioned to have been made for the alteration of the said order. That atterwards, to wit, on 26th Oct. 1833, in &c. at a spetial meeting of the said commissioners then and there held, it was proposed that the said order made at the mid meeting held on the 24th day of July &c. should be altered to the following effect, namely, "that the occupiers of buildings, yards and premises along the whole lines of wharfs or roads on the east and north sides of Brayford, be ordered to make footpaths the whole length of their respective frontages with small stones and gravel, with a four-inch kirb, and that

CHARLES-WORTH V. RUDGARD. CHARLES-WORTH U. BUDGARD.

the making footpaths in that manner with Mount Sowel crossings should be deemed a compliance with the said order;" and at the last-mentioned meeting. so held as last aforesaid, it was also then and there proposed, that the said original order be acted upon and put in execution. And the plaintiff further saith, that the said footpath so proposed as aforesaid, was at the time of the last-mentioned meeting, and when the defendant acted as a commissioner as hereinafter mentioned, a feetpath which could be made with less expense then the said footpath in the said order mentioned, and that the defendant, as such occupier as aforesaid, was during the whole of the last mentioned meeting, by reason of the said greater chearness of the said footpath so proposed as aforesaid, personally interested in the question, whether the mid original order should be so acted upon, or so altered as afbresaid. And the plaintiff further saith, that he the defendant then and there being so personally interested as aforesaid, well knowing the premises, but not regarding the said statute, did at the said meeting lastly mentioned, in the city and county aforesid. act as a commissioner in the execution of the said act, in the matter in which he was so interested as aforesaid, in this, that he the defendant, at the last mentioned meeting then and there being so personally interested as aforesaid, did, as such commissioner as aforesaid, act in execution of the said act on the occasion aforesaid, and did then and there vote for the alteration of the said original order, according to the said proposal, contrary to the form of the statute in such case made and provided, whereby and by force of the statute the defendant hath forfeited the sum of 1001 &a.

The second count stated that the defendant did ast as a commissioner under and in execution of the said

CHARLES-WORTH D. RUNGARD

act in the matter in which he was so interested as aforesaid, in this, that he the defendant at the said lastmentioned meeting, then and there being so personally interested as aforesaid, did, as such commissioner as aforesaid, acting under and in execution of the said ast as aforesaid, take part in the discussion of the question, whether the said original order should be so acted on, or so altered as aforesaid, contrary, &c. (concluding as in first count). The third count stated that the defendant acted as a commissioner in execution (&c, as in first count) in a case wherein he the defendant, at the time of so acting as aforesaid, was personally interested in the matter in question, contrary, &c. Plea: mil debet. The trial of this case having been removed under 38 G. S. c. 52. s. 1. from the county of the city of Lincoln, where the venue was laid, to the county of Lincols at large, it was tried before Tindal C. J. at the last Spring assizes for Lincolnshire, when the following appeared to be the facts of the case:-

By 9 Geo. 4. c. xxvii, s. 13. no person shall be car mable of " acting as a commissioner in the execution of this act" during the time he shall hold or enjoy any effice or place of profit under this act, or be concerned er interested, except as a creditor, on the rates or assessments, or as a shareholder in any company of proprietors for the manufacture of gas, in any contract made under or by virtue of this act, or in any ease wherein he shall be personally interested in the matter in question, and if any person not being qualified in the manner by this act directed &c., or not being or becoming disqualified by any of the causes in this act mentioned, shall act as a commissioner in the exequition of this act, every person shall for every such offence forfeit and pay 100% with full costs of suit, to any person who shall sue for the same in a superior quant by action of debt or on the case &c." The act

declaration transcand was thus pe About 8th Aug. 1883 he was appoin by the parish where he resided, was and inquired of Mr. Mason the cle to get the order of the 24th July, set tion, rescinded. On 28th Oct. a spe commissioners was held, pursuant to defendant attended and proposed to the 24th July, except as far as it reg perty. ! That course being rejected. that the order of 24th July be altere effect, viz. that the occupiers of but premises along the whole lines of w. the east and north sides of Braufo make footpaths the whole lengths o footways, with small stones and grav kirb, and that the making footpath with Mount Sorrel crossings shall 1 pliance with the said order. The o moved by way of amendment. ! The in favour of it, and against the ame order of 24th July as it originally ste tive part in the discussion of the que the other commissioners afterwards lotting, ball, held, it up to the plain

of 24th July in the manner proposed, and eleven few the amendment, which sought to establish that order as it stood at first and book at first and maked as and amended as it

At the trial the plaintiff, to show that the defendant voted by balloting in favour of the motion, offered to call the ten commissioners who with himself (the plain) tiff) voted for the amendment in the minority as well as M. another commissioner, to prove that he intended so ballot on the same side, but by mistake put his ball in a wrong drawer. For the defendants it was abjetted that the proposed proof of voting was irrelevant. and that the evidence of the commissioner as to what he intended to have done with the ball was bindd missible. The chief justice said, that the plaintiff might prove that the defendant had voted whi the vou casion in question, but that it seemed immuterial which way be voted, for if he was interested he had no right to vote at all, and if the jury should be satisfied that he voted at all, that was such an acting as a commissioner as would make him liable to a penalty if peru sonally interested in the matter in question. Having added, that if the misplaced ball was the defendant's it was no voting, and that there was no evidence of es acting but by voting he left it to the july to say whicher the defendant had worted in the view vd become

The jury found a verdict for the defendant that he had not; the chief justice afterwards gave the phintiff leave to move to enter a verdict for a penalty on the third count, which only stated the defendant to have acted as a commissioner in execution of the act; in a case in which he at the time of such acting was permissionally interested, without alleging that he worked the acted.

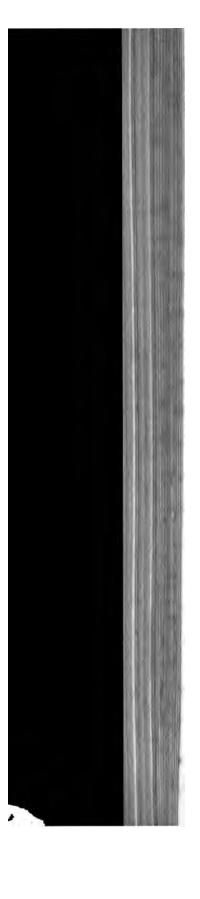
Darly in Easter term Bulguy for the plaintiff, moved to set aside the verdict, and to enter it for the plaintiff on the third count for one penalty, or for ill the witial, add

1824 CHARLES-WORTH V: RUDGARD!



dording to the leave reserved teiling the jury that there but by voting, and in not a plaintiff on the third count that taking a prominent sufficient proof of "acting davit of surprise and exchaving been granted, Ada obtained leave to argue a point at the trial, vis. that out proper notice, as requi

Adams Serjt. and Ame Parke B. The only quest in the evidence amounts statiste or not? If it do plaintiff to a new trial and jury have found that the d if the plaintiff had witne have done so, they should at the trial. If speaking sioner spoke against his o him to penalties; or if he the defendant was disqual on this occasion, the act its and the business could not be ruled by a small junta. of the mayor, the dean an sioners ex officio, and ne other persons elected by e perty possessed by them commissioners might order the whole city at once, yet each of them would be liab said that because all are commissioner is held to be



1884.

v. Rudbard.

every parish where he has property, the act can, in hardly any instance, be carried into operation. be sufficient to apply those terms to cases where he has an individual interest in the particular transaction, o. g. as appeal against the amount of rates made under the act. Now, as the commissioners ex officio need not be qualified by property, or be resident, they may not be liable to rates, whereas, every parochial commissioner must be personally interested in them and would be excluded. [Parke B. It is not clear which way they may be interested, unless the party states it: for the making a public path in the more expensive of two methods may be the most beneficial course, and though it costs more, may return money's worth. That differs the case from those put of individual interests in the autount of a rate, &c.] How can he vote on questions of rates for watchmen, lamps, &c.? [Purke B. With respect to those rates which fall on the whole body, every commissioner is in the same situation as every other person. The sense of acting as a commissioner must therefore be limited to cases where the party's interest is personally or individually affected by the matter in question.] On the point of notice, Parke B. was understood to say that the clauses had no reference so actions for penalties incurred by direct violation of the act (a), but only to acts done under colour of it (b). The verdict made it unnecessary to moot another point made at the trial, that the defendant had no such interest at would disqualify him.

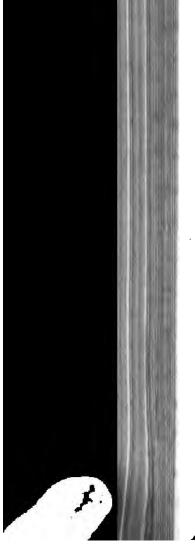
Balguy, Hill and Follett contrà. First, the ample evidence which was tendered to show that the defendant voted, was rejected; secondly, as the de-

⁽a) See per Bayley J. in Cook v. Leonard, 6 B. & Gr. 255; Morgan v. Palmer, 2 B. & Cr. 729, and 4 T. R. 485, 553.

⁽b) Graves v. Arnold, 3 Camp. 242; Stiles v. Coxe bart., Vaugh. 111; Batlet v. Ford, ante, Vol. III. p. 677.



fandant:might://act// most influenting other commis jury should have been tole acting : for discussing the was alone an acting as /1 took a ball in order to balls chief justice was mot aske dence tendered his attent and if bootis hard to reve sence of argument by pries In think Me the commis witnessi to show: what she ballotting.] The objection ming up and produced th given. The question, whe the jury apon that dant of tinct from that on the que which they found in the ne consisting rexchasively; of Suppose a man in a privat state his case to the com meeting at which no one l present; or, being present, missioner, who, as an and pensive footway opposite li from so objecting by the missioner? He proposes to untouched as to his own w act by moving ito rescind meeting in the same situatil appeal is to the sessions, unless he could not act w whether he acid at the me character, would be for the duct there. The only per signard and their clock.



jects of the statute, which were to prevent his neticing in

cases where his private interest was conterned by pirocuring votes, though he does not vote himselfoulThere was evidence not only that he acted by discussing the questions:mooted, but that he voted afiliarke Bucketing an la commissioner, means doing any thing whatevelvin that characters c. g. attending their meeting to form a quoramplor, speaking.] ur Here the defendant was inchvidually interested in the amount of tax to be daid on himog Asto orders affecting the whole city the com-

midsioners would not be interested in them personally of individually, but in common with the other inhibitants, ballotting [1] The objects of a color of are any mesonic Actions die worth and the second of the second o The questions of altered and areas in a first -On the last day of the term the judgment of the

court was thus delivered by the documental mort built

cette com a con a grade which they found on the assist PARME B.—This was an action to recover suggestive insposed by a local act; which by one coffits clauses directed, that if any person disqualified from acting as a commissioner in execution of the act, by dising personally interested in the matter in question, should arrive such commissioner, he should forfeit 1004. There were sterbad counts in the declaration, to the third of which, changing the defendant simply with acting as a commissister, being personally interested in the matten in quein tion, the attention of the learned judge does not appear to there sie en sufficiently drawn, at call events, at the mather time. It appeared that there were thirty-tocommissioners in Lincoln for carrying the actinto effect. of sibon, the mayor and dean and whatter were come missioners ex officio; and she rest (ware sleeted, two by each marich in the city in respect of kandification by preparty in the electing parish, vi Theildefendant was

1834. Charles-WOLTH Rudgabn CHARLES-WORTH v. RUDGAND. meeting, an order had been issued by them for making the footway in question, which passed in front of the defendant's among other premises, with somewhat expensive materials: and the meeting in question was called by notice to reconsider that order, and propose a chesper kind of path. At this meeting the defendant moved to rescind the original order, except as respected his own premises. What he did on that occasion cannot be considered as acting as a commissioner, being personally interested in the matter. . . A motion was then made for doing the work in question in a different manner from that pointed out by the original order. defendant then spoke in favour of it as preferable, from requiring less expensive materials, and against the original order of 24th July, which had been moved as an amendment. He afterwards proceeded to ballot with the other commissioners for adopting or rejecting the motion for a cheaper path. On examining the ballot-box, twenty balls were found for the motion, eleven against it, and the remaining one ball which had been dropped into a wrong drawer. The learned chief justice left it to the jury that there was no evidence of the defendant's acting as a commissioner unless he had voted as such, and left it to them whether he had so voted. The jury, not being satisfied that the defendant had so voted, gave him a verdict. Had the case rested on the evidence of the voting only, we should not have disturbed their finding; but the voting was said to be the only evidence of the defendant's having "acted" as a commissioner, whereas his having taken part in the discussion on the motion for the less expensive mode of paving, should have been left to the jury as evidence applicable to the question on the third count, whether he acted as a commissioner on that occasion or not. If he had taken part in the discussion merely as pointing out that such and such

have amounted to an "acting" as a commissioner; but as he attended as a commissioner and used influence over others by his words and actions in that character, it should have been submitted to the jury whether what he so did was or was not an "acting" as a commissioner within the act. We are therefore of opinion that there should be a new trial in this case. There is here no doubt that the defendant was personally interested. Cases might exist where nearly all the commissioners would be equally in the situation of persons personally interested in the matter in question. Here, the only question was, whether in what he did he acted as a commissioner under the act in question? and that is a proper question for a jury.

CHARLES-WORTH V. RUDGARD.

Rule absolute for a new trial.

See Towery v. White, 5 B. & Cr. 125; Faulkner v. Elger, 4 B. & Cr. 1449, 455.

THOMAS against EDWARDS.

moving for a new trial in this case, which had before whom a trial takes been tried before an under-sheriff, on the ground that he had not yet sent up his notes of the trial according to repeated promises. He said that in a case in the does not, after promising to do so, send

PARKE B.—Take a rule. If the under-sheriff refuses the trial within the time proper for moving for a new trial,

(a) See ante, 270, Jahnson v. Wells. And Burney v. Marcson, 1 Adol. & enlarge the time for moing, and per

d er 🤫

before whom a trial takes place under 3 & 4 W. 4. c. 42. s. 17. does not, after promising to do so, send his notes of the trial within the time proper for moving for a new trial, the court will enlarge the time for moving, and permit

the facts proved at the trial to be laid before it on affidavit.

On 23d May the plaintiff had a verdict in a cause tried before a sheriff on a writ of trial issued under 3 & 4 IV. 4. c. 42. s. 17. He did not till the 27th, after taxing costs on that day. Held, that the judgment was signed regularly and in time within the term " forthwith" in sect. 18.

such order, and the verdiet of such jury on the first or Nicholls and Another against To such dous Nicholls and Another against Chambers.

THIS cause was tried before the thater-sperm win 22d May, the first day br this termy dinter a writ of trial, pursuant to buiged mongot une til twab Tre jury process was returnable 21st May. The parant having obtained a verdict; the costs were taxed; and judgment Bignedolf for the patter of the bangie hamed his obtained by Comyn for setting uside the Juagaselle and sign judgment all subsequent proceedings for mregularity with costs, lit So, though under I W. 4. c. 7. immediate execution

> Kelly showed cause. As there was no destrucate sin the writ of trial by the sheriff before whom the class was tried, or any order by a judge that judgment should not be signed, our that execution should be stayed till the defendant should have Irau are logical tunity to apply to the court for a new that, the plaintiff was entitled, pursuant the . 18! of 3124 in the bearing sign judgment and Issue execution at the time ne all No rule for judgment was necessary in Red . Cres. Thin 2 W. 4. No. 67. [Ante, Vol. II. p. 346.]
> And American Ham of the same and the man of the same of the s

> Comyn, contra Sect. 18. bf 5 & 4 97. 4. c.de enacts, that at the return of any such witt of inquity or writ of trial of such Issue or issues as a toresait. costs shall be taxed and judgettent signed, and execution issued forthwith, affless such sheriff, or the hepaty, before whom such writ of inquity lindy be executed, of such sheriff deputy or judge, before whom such trial shall be had, shall certify under his hand upon such writ, that judgment ought not to be signed, until the defendant shall have liad as opportunity to apply to the court for a new inquiry or trial, or a judge of any of the said courts shall think fit to order that judgment or execution shall be stayed to a day to be named in

such order, and the verdict of such jury on the trial of such issue or issues shall be as valid and of the like force as a verdict of a jury at nisi prius. The latter clause confines the operation of the verdict to the ordinary sule by which the losing party at nisi prius has form days in term to move for judgment, or in arrest of indament, or for a new trial before the plaintiff can tax costs, and sign judgment. As the plaintiff did not avail himself of the former part of the statute, to have immediate execution without getting costs, but waited till the 27th to tax the costs, that ordinary rule applies. So, though under 1 W. 4. c. 7. immediate execution might have been obtained, the costs must have been sizes unit months are the costs must have been

moughing tools aching an of opinion that this rule should be discharged. A verdict obtained on a trial had under this rate does not stand in the same situation as if obtained at nisi prices. The latter part of the section does not exclude the effect of its earlier words, and is quite consistent with them.

ALDERSON B.—I am of the same opinion. "Forthwish", merely, means, that, the plaintiff shall tax his costs, sign judgment, and issue execution as soon as he can apply his omitting to sign judgment and issue execution immediately after the trial, is no waiver of his powers to do so when he conveniently can, viz. as soon as he can get the costs taxed.

Is it does mode and do apply to give the first and fine bourses of a time of the costs taxed and in the bourses of a time of the first and the costs as moved.

In or yluque Bule discharged, with costs as moved.

To the oppose of the costs and the same face of the same of the sa

NICHOLLS and Another v.



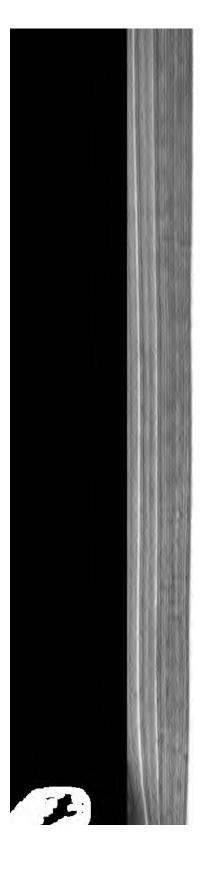
HAMMOND ag

After a defendant has consented to withdraw a juror, and consequently to pay his own costs, it is too late to move that the plaintiff's attorney do pay his costs of defence on the ground that the plaintiff never nuthorized him to sue the defendant.

TRESPASS quare claimand licence. At the state the suggestion of the obtained by Thesiger, calling to show cause why he show costs of defending the action stated, that the plaintiff has the bringing the action, but prevailed on by his attorned the defendant, without being intent of the paper signed. the above were produced by

ALDERSON B.— The first the defendant had agreed consenting to withdraw a justice of the grounds here stated affidavits, they would have he obtained a verdict on the of the plaintiff's insolvency, room of the plaintiff, and a incurred by the defendant; chosen to take his own comow charge another person such an application is cite affidavits are answered.

Per Curian,-Ri



LAKIN and two Others, Executors of WATSON, against

THIS was an action against the maker of a promissory No amendnote dated 9th April 1827, by three of the exe-of summons cators of the maker. On 4th April 1883, a writ of will be persumminous issued at suit of the above three plaintiffs, in a case who afterwards declared; but on the defendant's plead- where the ing in abatement the nonjoinder of P. W. the remaining mand would executor, a rule was obtained calling on the defendant otherwise be barred by the to show eause why the writ of summons and the declas statute of limiration should not be amended by adding the name of tations. R'W. as a co-plaintiff. It appeared from the plaintiffs' affidavits, that if the amendment was not allowed, the debt would be lost.

Whateley showed cause. The merely stating the date of the note in the affidavit does not necessarily prove that the debt would be barred by the statute of limitations if the amendment is not made. Besides, the courts will not amend writs of summons. Dear in let of they be a second provided a Second con-

a will

Watson and J. Henderson appeared in support of the rule. It shift if the form of the company of the rule. Jim and teathers of seed over

PARKE B .- A great majority of the judges were of opinion, that no amendment of a writ of summons should in any case be permitted (a). That rule was however deviated from in the single instance of Horton v. Inhabitants of Stamford (b), where this court allowed such an amendment, on the ground that if the general rule was adhered to, the plaintiff's remedy would be barred by the operation of the statute of limitations.

and a time of the area after

⁽⁴⁾ And see Barker v. Weedon, post.

⁽b) Ante, Vol. III. 868.

in giving judgment, puts cases where tions amendments have been permit that the party would otherwise be too a fresh actional treeses sit garagety that out of horset of side of correct Mandenson Bi-The case gited he thority, the rule should be made abso to different confidence main terminate English against GURNAY B. concerted. don't to house a cota outcome a Ru is the of time to those the first of a (a) Sec Holgkinson, v. Hodginson, K. B. May 2 MSS. and Barker v. Weedon, post, 860. erg open of compared to the second PATMORE against COLEU

A previous agreement will be determined by a later one which is necessarily inconsistent with

it in effect, though not

" Memorandum of an agreement m tween P. G. Patmore on the one part, on the other parts arranged at the con-

containing any express stipulation in turns for so superseding it. plaintiff agreed with defendant for twelve months for the perliterary works to be thereafter indicated by the defendant; 4 from the defendant for the same six guineas a week, and not to

A SSUMPSIT: on two agreements;

28th May 1831, was as follows to

The said Mr. Patmore agrees to enter into an agreement for twelve months, with the said Mr. Colburn, for the performance of various literary works to be hereafter indicated by the said Mr. Colburn. PATHORE v.

with Thensaid Mr. Patmore to receive from the said Mr. Colbum for the said literary labours, the sum of stronguineas per week, and the said literary labours, the sum of stronguineas per week, and the said literary labours.

Mr. Patmore's performing his present engagement to the full extent, the matter to be referred to two indifference literary persons, one to be named by each party, whose award in the final and in interest of the party.

"It is further agreed between the said parties, that Mr. Patmore having been connected with the Court Journal ishall not; during the above period of twelve months, engage in any other similar publication; but that at the end of six months from the present date, he shall be at liberty to purchase such share of the journal as may hereafter be agreed upon, at the present estimated value of 5000l. for the whole property; such share not to be less than one fifth of the whole.

"It is also finally agreed, that Mr. Patmore shall abandon all histile proceedings against Mr. Colbura, and that Mr. Colbura, on his part, shall abandon all patuniary claims con Mr. Patmore up to the present paritid." A history one

(Signed by plaintiff and defendant.).

The second agreement, dated 14th October 1831, was in these words:

This agreement is made this day between H. Colburn of New Burlington Street, publisher, of the one part, and P. G. Patmore, of Craven Hill, gent., of the other part.

before the 12th day of November next, to take upon

present required on the Saturday a week, so that they shall not interfer attention necessary to be given to 1 and the said P. G. Patmore herel literary management of the Court J. pare for the press all articles belong best of his ability and to the satisf H. Colburn; to write on the average weekly; also the reviews and articles literature, the drama, fine arts, d events, to select from other journal found suitable for the pages of the C generally to contribute, to the utmos the interest and success of the said jo "That the said H. Colburn shall P. G. Patmore for such editing, 1 writings, at the rate of 10%. per week, ments. "That anticipating the successful

which hours are not to be increase

tions of the said P. G. Patmore in fa journal, this agreement is entered in parties, in full confidence of its become one, although it is for the present agree shall be legally binding for one year, expiration of the said year, or at any subsequent period, whilst he remains editor on account of the said H. Colburn, that the said P. G. Putmore shall have the option of purchasing a quarter share of the said journal at the present estimated price of 1000l., whatever higher value it may be of at such future period.

PATNORE v. COLBURM.

"It is also hereby expressly agreed upon, that political controversy and party politics shall form no part of the said journal, without the consent of the said H. Colburn, and the most perfect impartiality be adopted in the literary and critical departments.

"It is also hereby agreed, that the free admission of the theatres and other public places of amusement, and all books, prints, and publications sent for the purpose of reviewing, shall be equally divided between the said parties, for their mutual use and convenience."

(Signed by the plaintiff and defendant.)

The breach of the first agreement was assigned to be the not paying the plaintiff six guineas a week during the twelve weeks. The breach of the second, was the non-payment of the 10% a week, and the discharging the plaintiff from his employment under it without proper notice: Plea, non assumpsit. The particulars of demand were for sums claimed to be due on the two agreements, without any claim on a quantum meruit. At the trial before Vaughan B. at the Middleser sittings after Hilary term, it appeared that if the first contract was superseded by the second, the defendant would owe nothing to the plaintiff. The plaintiff had been paid at the rate of six guineas a week from the date of the first down to that of the second agreement, and ten guineas a week after the latter date. plaintiff had a verdict for the sums claimed on both. agreements, subject to leave to move to enter a nonsuit on the above point.

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nours ne belgmissoos disressissification arivelistation at time has he to give to perform the literary labour menand Peterstiorff showed commeter filled terment the representative 28th Africa 8311 velococothet itentit binding our they describe of irrivalely over another contains nothing assess with the shound hardement to show it and research described against the property of the best true defendants the virging on gaterdity employ the plaintiff for twelve months cortain at six agains as a sweek, silte plaintiff arrived that his would not all disting the above incutional perist of twelve months; engage tindahly otherominica publication!" builthat was the chiefobject of the defauland strong act esther of ore if she delainties is a color so title to be baid by the defendant downgathe stime that in engaged not to entir on any other similar Endertaking he will drawe theen idebarred of obtaining white liveliheed during that the entitle and the safety and the safe done properly under the Bistinggeoment, for Alignithe del fembant das been really and willing its discharge bis set of the tagreement for the twilve months spirit if souther though netscalled on taidosou her may recover for the whole brime a Grandall man Pontingthy (*) was Alders on B. By the second agreement, the terms of the postspictives: changed. wGan you may thist aboth agreements who force at the same time all The second agreement hinch inconsistent with the first infoir though by it sthe while of the plaintiff's time is to be devoted atte the the idutional editing the Court Journal with the exception of cont this hours required for the County? Press, and sto time is excepted after performing the plaintiff go duties and go the views engreenies that best sunneressing it having been impressly stipplated for already shouth to install menturo [Alklerson : Rd : Bro Abeo Becomb ingrenment alte itil to devote all his time to the flour Journal exception.

hours he bestowsoon the Governie Bregnive Ilhen what time has he to give to perform the literary labour menthoned in the first agreementalle field his time," means all that it indecessary the Sandard the Caure Journal wells andelves adtepraventshim formalising byth exception and do other worksonk Lord Landbursts Thermony degrees of theritime poblecting sat publication of the light well, detters conditionally well unight generate a perpetual contest water state want properly done of note of the Best cicemity what the defendant of all take for its due endention of the state of estimating for the editoria whole time, loo select pierent his mind from sieing districted by so the night blidstions pland it o poppentrates list their and energies and the single blick of this (Count) Jamishati Infi heltime redcupied by literary behops much vary dilocording grountido way bin unhibheit dis veretite del New this agreement stipulates for the whole stime and be to this loved by the plaintiff; nothing in the second attragenient presentetly bisicalding githernworks by restoral additions greeneed the but test to an utilities the form of the state combidired dor this purpose has fall aliman's timed't Forth Whithurst O., Builfid engage in tuior itoriderate Maswhole time to the educating my child, and ke taket Mother, Might is not complain af this doing someone Joula Wheranganbuer tooday that impichild was prost play reducated (ligrocal then contembed) that the comdecress the defendant in calling country flaintill since the date of the record agreement to perform services theblack is it, showed that it was merer intended takuke Aitebagrietment should be superseded of blord Distribute ConBest Theodefendant: mightodaye swaived the levoridity we mean as to those marticular quatterest hat theis summer idence to show that he called on the terleveds at les needes the first Aerones exclisionals agreement, or that they were done while it continued will be in fining on the state of the state

PARMORRI COLBUSTO

stopped by the court.

Lord Lyndruss C. B.—If to 14th October 1831 supersed 28th May in that year, it was prehad been paid down to the first of ing to the first agreement. If the not so superseded, the plaintiff retain his verdict. The only quest the first agreement was in force a second? I am of opinion that it was constructively put an end to I ment, the stipulations of which sistent with those of the former in it could not itself be operative it tinued.

BOLLAND B.—A material diffetwo agreements appears in the imwhich the second leaves it open purchase a share in the Court J. first agreement stipulate for the whitime, or except any hours for his

by the second he agreed to devote to the various duties of editing the Court Journal, all his time and attention, except certain fixed hours reserved for labour at the County Press. Now that undertaking is evidently inconsistent with the existence of the first; for "all his time" must include that portion of it which was stipulated to be employed in literary labours, to be indicated under the first agreement. The second agreement binds the plaintiff to devote to the Court Journal all the time which he gives to literary work; and with one exception excludes all other kinds of literary labour.

PATMORE P. COLBURN.

GUBNEY B.—The different rates of valuation of a share in the Court Journal which are presented by the two agreements, are strong evidence that the second was intended to supersede the first.

Rule absolute to enter a nonsuit.

Siggers against Lewis.

SSUMPSIT against the defendant as indorser of a by the indorser of a bill of exchange. Plea, that the action was commenced before a reasonable time had elapsed for the indorser of a bill of exchange, it is payment. Demurrer and joinder. The Court called on plead that the

Chardless in support of the plea. The implied contract commenced before a reasonable time after sonable time had elapsed

by the indorsee against
the indorser
of a bill of
exchange, it is
a bad plea to
plead that the
action was
commenced
before a reasonable time
had elapsed
for the defendant to pay the

notice to him of the non-payment by the acceptor. for the defendant to pay the bill, after notice to him of the non-payment; for the cause of action accrued against the bill after notice of disherour.

Quere, if a tender promptly made within a reasonable time after such notice received, would be a defence to an action even for nominal damages only for non-passent in the interim?

Siggers v.
Lewis.

Walker v. Barnes (a) decided, that the drawer of bill is only bound to pay it within a reasonable to after receiving notice of its dishonor; and that a tend by him on the day after that on which he received a tice of the dishonor, was in time to prevent, the hold from recovering damages for the non-payment in the interim between the notice of dishonor and such tende For if it had been considered that any cause of active had accrued by the breach of any contract before il tender, the plaintiff in Walker v. Barnes must have recovered nominal damages, as in Hume v. Peplos (b where the holder of a bill was held entitled to recove nominal damages against the acceptor, not withstandin a tender had been made after the day of paymen The question here is, whether the plaintiff, when h commenced his action, had a good cause of action : whether he had any good cause of action till a reason able time elapsed after the defendant, the drawer, ha notice of dishonor; where, as in this case, the law implies a contract by a defendant, it always allows a reasonabl time for its performance. [Alderson B. You woul argue that a declaration against a drawer or indorse instead of merely alleging " that the acceptor did no pay the bill, though presented to him on the day whe it became due, of all which the defendant then and the had notice," ought to go on and allege that " although a reasonable time has elapsed after the notice to th defendant of the non-payment of the bill, yet he hat not paid the same; but there is no instance of such declaration. The cause of action is the non-paymen to the plaintiff on request, and not, as argued, the non payment after a reasonable time had clapsed after notice of non-payment.]

Lord Lyndhurst C. B.—In Walker v. Barnes, the

⁽a) 5 Taunt. 240; 1 Marsh. 36. (b) 8 East, 168.

1834.
SIGGERS
LEWIS.

defendant tendered as soon as possible after he received notice of the dishonor. There appears to have been a kind of compromise in that case, the chief justice having said no jury would give the plaintiff a farthing damages. Now the contract of the drawer is, that the drawee will accept and pay the bill. Fill the drawer has notice of the drawee's default he is not liable to any action, but he is liable to an action immediately on receiving such notice, unless the money be then paid. If after the notice to the drawer, and before a writ actually issued against him, he promptly and directly makes a tender, that, according to Walker v. Barnes, may be a defence (a). It is not unfrequent that a plaintiff, by suing out writs immediately a cause of action arises on a bill, estops the parties to it from all remiedy, except by coming to a judge to stay proceedings. gand gan a til film fra deleg af for and the film of t

BOLLAND B. concurred to the second straight of more than

ALDERSON B.—If a drawer should make a tender, or pay within a reasonable time after the defendant has received notice of the dishonor, and before action commenced against him by issuing a writ (b), that tender or payment might perhaps be pleaded, as having been done within that reasonable time. That would be acting on the principle of Walker v. Barnes. Assuming it to be a sound decision, it only establishes that tender in a reasonable time (24 hours) after receiving notice is a payment on the notice. The plea does not state that the action had not accrued, but that it was commenced before a reasonable time had elapsed.

GURNEY B. concurred to the tree of

Mansel was to have supported the demurrer.

(b) And see Hume v. Peploe, 8 East, 170. contra, per Lord Ellenborough.

Risers v. Griffiths, 5 B. & Ald. 620. semb. acc.; and see 1 Saund. 33. b. n.

(b) See Alston v. Undershill, ante, Vol. III. 427; Thompson v. Dicas, id. 823.

VOL. IV. 3 K

WARREN against WARREN.

Beer also

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A letter written by the defendant and containing a libel, was dated in Essex, and addressed to a person in Scotland. It have been in the Colchester post office, and, after being marked there, to have been forwarded to London on its way to Scotland. It was produced at the trial, with proper postmarks, and with the scal broken, but not by the party to whom it was addressed. Held sufficient primâ facie evidence of a publication in Essex, and that it. had reached its address in Scotland.

A letter to the manager of a property and defendant

ASE for a libel.contained, in a letter it Bleaugemeral issue. At the trial before Gaseles It at the last assizes for Essen, the letten in question Amorpeo. duced with the seal broken, and the Colchester postmark on it. It bore date at H. house in Essen and was proved to be in the defendant's writing, addressed was proved to to a person in Ayrshire, who was the manager of the perty in which the plaintiff and defendant (brothers) were interested, and about which there had been litigation. It principally concerned that property, that in one passage charged the plaintiff with tyrangizing out his mother and aunt, the writer stating that he thought it necessary to explain why he was opposed to the defendant. The Colchester postmester proved the meent of the letter at Colchester from Hanksley, the Colches ter postman, and his own writing the amount of postage on it, and that it was forwarded to London, on its read to Scotland. The person to whom the letter was directed was not called to prove its receipt. The defendant's counsel objected, first, that a publication in Essex was not sufficiently proved; and secondly, that it was a privileged communication. The learned linder: held that the putting a letter into the post in Essex, and its receipt by the party, was evidence of a publication in Essex. The plaintiff had a verdict for one shilling damages, subject to leave to move to enter a nonsuit, first, on the ground that there was no proof of publication in Essex; and secondly, that if there was, which plaintiff it was a privileged communication.

were jointly interested, relating principally to the property, and the plaintiff's conduct respecting it, but also contained a passage reflecting on his conduct to his mother and aunt:-Held, that the latter part could not be privileged as a confidence tial communication.

A rule having been obtained by Platt according to the leave reserved,

1834. Warren Warren,

Spankie Serjt. showed cause. First, there was evidence for the jury of publication. [Parke B. The production of a letter with the seal broken, and the production of a letter with the seal broken, and the production of a letter with the seal broken, and the production of a letter with the seal broken, and the production of the person to whom it was disacted.] Secondly, the charge against the plaintiff, of the person over his mother and aunt, was not a privileged compiumication.

Platt and Channell contra. There was no evidence that the letter was received in Scotland by the party to whom it was addressed, or how it reached the plaintiff's hands. But if there was prima facie evidence. the judge should not have treated the receipt of the Letter as conclusively proved, but should have left it to the jury to eay whether the party received it or not. Secondly, the judge never left it to the jury to say whether it was a privileged communication or not. For its terms show it to have been written in answer so one addressed to the writer, respecting the property which the plaintiff and defendant were jointly in-That was clearly citables that a privileged communication, unless the phasis could have proved express malice.

PARKE B.—Prima facie evidence is sufficient for a jury till the contrary be proved. Now the sending a latter by the post is prima facie evidence that it was sufficient for a prima facie evidence that it was sufficient to its direction, and that the person to whom it was addressed received it in due course of post (a). The only question is, whether that part of

⁽a) 1 Camp. 267, and see Toogood v Spyring, ante, 582.

[&]quot;19 Tee His v. Williams, 2 Campb. 506; Rex v. Watson, 1 Camp. 215; Rev. Burilett, 4 B. & Ald. 95; Rex v. Johnson, 7 East, 65; Abby v. Lill, 2 Mile, 309; Rex v. Plumer, Russ. & Ry. C. C. L. 164; and Fletcher v. Brieflyll, cor. Holroyd J. Lanc. 1822. 2 Stark. Ev. 466. n.

WARREN Do., WARREN.

parties were jointly interested could be considered privileged. Now though it might be privileged as confidential so far as it respected their common property, it must be held to be gratuitous as far as related to the plaintiff's alleged conduct to his mother and aunt. The manager of the Ayrshire estate could have no concern in that. As to the judge's certifying to deprive the plaintiff of costs, we have no power to control his plaintiff of costs, we have no power to control his discretion on that subject.

The other barons concurred of the plaintiff of costs, we have no power to control his discretion on that subject.

The other barons concurred of the plaintiff of costs, we have no power to control his control of the plaintiff of costs, we have no power to control his discretion on that subject.

The other barons concurred of the plaintiff of

Land belonging to the father of the lessor of the

lessor of the plaintiff had been held by his leave, and under him, by the father of the defendant, from 1812 to his death, in 1881, on the understanding that a benefit as well be interested in passession of the defendant, till the death of the father of the lessor of the plaintiff in 1829, and from that time till the ejectment delivered. No claim or, paythers, of transart action releases in the tenancy by either the defendant or his father was shown. No demand of the possession from the defendant was shown; but mostler to show that the defendant had determined the tenancy by disclaimer, the lessor of the plaintiff put in a letter from the defendant stated, that the facts not being within his knowledge, he had referred them to his solicitors, and had requested that to communicate with the lessor of the plaintiff. The second letter to him, from the solicitors ran thus:—The defendant has given us a letter from you on the subject of some ground you state to have been let by your father in 1811, and which has ever since been in the possession of his lordship's family. We will thank you to let us have the proofs that it was not the late lord's bon. The Otier letter from one of the solicitors requested further information as to the late Mr. Lewis having a right to let ground to Earl C. Wedd, that those letters and not allow to a disclaimer, and that if they did, they would not he sufficient for that purpose, being written after the day of the demise laid in the declaration.

The letter of the defendant did not authorize his solicitor to bind him by any disclaimer.

Semble, If an admission of a disclaimer is made after the day of the demise, it must recognize a disclaimer as having been made antecedent to that day, or it will not determine a tenancy.

Llanelly in Glamorganshire. The day of the demise was laid, 2d of March 1830. The venue had been changed to the county of Carmarthen, and at the last summer assizes for that county, it was opened by the counsel for the lessor of the plaintiff, that in 1813 his father, then solicitor and confidential agent to the defendant's father, the late Earl Cawdor, suffered the latter to erect works for smelting lead, at the expense of 8001., on a little piece of waste land called the Hook, being a "pill" of land reached by high tide, which adjoined to, and, as they stated, was part of Penrhos farm, the agent's property, on the understanding that a lease was to be granted to the earl on terms to be afterwards settled. The late earl died in 1821, and no such lease was ever granted to him; but the smelting works were abandoned in a few years after they were built, and were afterwards let by the late Mr. Lewis, as Lord Cawdor's agent, to Messrs! Waddle, who had paid rent to Lord Cawdor. Mr. Lewis, the agent, died in 1829. No rent paid to him, claim of rent by him, or acknowledgment of his right by either earl appeared, but it was set up that the rent of a field of Lord Cawdor's, occupied by his agent, had been set off against the rent due from Lord Caudor for the Hook. In 1830, his sen and heir, the lessor of the plaintiff, applied to Lord Caredor requesting a settlement of the terms on which the land in question was to be held of him by Lord, Chief on The following letters were then produced for the lessor to show a disclaimer by the defendant. gran auf albuba bein fielfel ber begent bei eine ber ber

Doe v. Earl Cawpor.

The tal of her Angel Grosbenor Square, 3d March 1830.

seithe subject of the lead works at Llanelly. As the circumstances mentioned in it are not within my know-ledge, I have placed it in the hands of Messrs. Farrer,

on the subject of some ground you let by the late Mr. Lewis in 1811, as since been in possession of his low will thank you to let us have the pare the late lord's own, as you are away is one that the present earl is tot with except from your letter.

D. Lowis eaq. (Signed)
Lincoln's Inn Fields, March 4, 18

"Sir,—I should be very glad if y further information than that contain of the 6th of March, as to the late a right to let the piece of ground in Cawdor, as it appears to me that the tioned in your letter, at the utmost, Mr. Lewis might claim it, and does n Lord Cawdor admitted it even on the his own agent. However, I hope to either at the Hereford assists or in the then enter upon the subject with him D. Lewis esq. Your's, &c. 1 March 10th, 1830."

For the defendant evidence was

In Mighaelmas term last the Solicitor-General (Sir John Campbell) obtained a rule for a nonsuit and it was contended that at all events notice to quit was Bosanquet J. held that the letters pro-Becessary. duced amounted to a disclaimen, which rendered that proof unhecessary, but gave leave to move to enter a mount doing he as a new at W. p. me, then to quising bed to more your warment and contain Econo and E. V. Williams showed cause for the plaintiff in Easter term. The question is, whether hat leaser of the plaintiff could recover without proving a notice to quit to or demand of possession from the defendant, or without some wrongful act, as disclaimer &c., by him, to determine his lawful possession before the day of the demise laid in the declaration (a). [Parke B. The lesses of the plaintiff must show a right to enter manifold March 1880; the day on which the demise is hald The late earl was, during his life, tenunt at will in the strictest sense to the late Mr. Lewis, having cutared with his consent under an agreement for a Indie (1) a That tenancy at will determined by the **Indexis** this late earl's death (c); and the subsequent because of the stesent lord does not amount even to sustaining at sufferance, for it did not originate in a limital title (d); then no notice to quit was necessary (e). **h** Doe v. Pasquali (f) a notice to quit was held necountry before an'ejectment could be maintained against

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1834 Dot v. Earl Cawdon.

⁽w) See Right v. Beard, 13 East, 210, 212; Doe v. Jackson, 1 B. & Cr.

448; Doe v. Stennett, 2 Esp. 716; Doe v Smith, 6 East, 530; Doe v. Lander,
TSERT. C. N. P. 308; Doe v. Quigley, 2 Campb. 505; Doe v. Sayer, 3 id.

41 Hagin v. Jakubn; 2 Tainti 148; Doe v. Brench, 6 Esp. 106.

11 (1) Seepnett to 7th edition of Watkins on Conveyancing, 19.

12 (2) See same work 25, and Co. Lit. 57 b.

(4) See Doe v. Lander, 1 Stark. C. N. P. 305.

⁽f) 1 Peake's Cas. 197, 1st edit.; 259, 3d edit.

Doe v.
Earl Cawdor.

a tenant in possession, who having held of the testator under whom the lessons of the plaintiff claimed as devisees, professed himself ready to pay his rent to any person who was entitled to receive it, though he had not paid it to the dessors of the plaintiff, the due execution of the will having been litigated in In that case, a clear tenancy to some one was admitted to exist; whereas here, the defendant claimed the locus in quo as his own. Doe v. Pasticuli will not be extended further, as appears ifrom Doe vio Froud (a) and There, though the tenant in possession set up no claim to the premises, but, in answer to a request to him for reat by the reversioner after the death of the former lesser, a tenant for life, declared that he had not hitherto considered the lesser of the plaintiff to be the landlord of the premises, but professed himself ready to pay the rent to any one who should be proved to be entitled to it, the court held that a disclaimer, Best Ci J. adding, that he should not have thought differently had the case been exactly like that of Dve v. Pasquali, because a notice to quit is only requisite where a tenancy is admitted on both sides; and if a defendant desires the tenancy, there can be no necessity for a notice to end that which he says has no existence! Parke B. To what period does the alleged disclaimer refer ? To any period since 1812, on which the demise might have been laid. Thus in Wilton v. Girdlestone (b), a demand and refund after a bill had been actually filed in trover, was held evidence of a conversion before that time. v. Grubb (c) the declaration by the tenant in possession on 26th June 1813, that his connection with J. G. had ceased for several years, was held to be evidence of a disclaimer antecedent to the day of the demise laid in the declaration, viz. 1st May 1813. Now the letter of

⁽a) 4 Bing. 557. (b) 5 B. & Ald, 847. (b) 10 B. & Cc. 816.

4th March falls within that principle, as a statement by the defendant that he held the land as his own.

vite of from and viscon to discuss the

Doe v.
Earl Cawbon.

The Attorney-General (Sir John Campbell), John Wilson, Chiltun and Whitcombe supported the rule for the defendant. This land was held by the late lord . with the knowledge of his late agent and the lessor of the plaintiff, without their disputing his title from 1812 '40 the service of this ejectment. Then the possession . of the late earl and, of the defendant was lawful, and could anly have, been determined by demand of possession, which is not proved, or some act of disclaimer by him previous to alst March, the day of the demise laid in this declaration in Now the letter dated 4th March "maken no assertion for disclaimer, but only calls for deformation and proof that the land was not the late cearl's town property. It would not have been a for-, feiture tof a lease had one been granted. The third mletten adjourns the question to a meeting at Hereford reasises, which is not shown to have taken place. i [Parks B. Had Mr. Farrer, as agent to the defendant, nauthority under his first letter to admit antecedent facts Lins against his client? To make this a disclaimer it is must be connected with the previous facts.] Doe v. 1. Raggeali ascertains the law correctly (a). In Doe v. .hilfrand the defendant's letter stated that he had never is considered the lessor of the plaintiff as his landlord, is and amounted to a distinct refusal to pay rent.

sold all pant the cases.
Anisseson ai hour sold and a control of the Cur. ador vult.

Early in this term the judgment of the court was delivered by

^{• 1.69)} Gaseles J. remarked in Doc v. Froud, 4 Bing. 560, "If the defendant had held under the ancestor of the lessor of the plaintiff, the question agitated in Doc v. Pasquali might have arisen; but all his interest expired on the death of Mrs. Smallpiece", (the tenant for life, the defendant's lessor.)

, PARKE B. This was mection of singupent for the recovery of some land which had been enjoyed, by the late Earl Candor, and after his death, by his son the defendant, under Mr. Lewis, the father of the lever of the plaintiff. The chief question was whether cartain letters given in evidence stathe trial of this mum amounted to a displainer of the title of the leaser of the plaintiff.... The avidence moduced at the trial showed that the late earl came into possession as tensor at will to the late, Mr. Lewis, ... It was contended for the deformant, that, under the circumstances it, was, pecasars for the lesson of the plaintiff to show, a determination of the tenancy of the present defendant, by a notice in quip or a demand, of possession (a); while if for the lesses of the plaintiff, it was replied, that the letters in such tion amounted to a disclaimer, and put an and to an tenance, which, had subsisted between the parties. To this last argument the learned indge assented, but m do not concur with him in opinion to Wanthink that those letters did not amount to a disclaimer, and that if they did, such disclaimer would not be sufficient, for it was written after the day of the demise laid in the declaration, so that without other proof the defendant does not appear to have been at that time a trespasser. If they are insisted on as containing an admission of a . . r provious disclaimer, it is clear they also id. a mount 'to's recognition of a disclaimer succeedent, to the day laid as that of the demise it is therefore, we could when any reliance on those letters, there is still no evidence in the cause to show that the writer had authority to Wit while to I at the dealer in set be to 3 .3.

⁽a) The possession of the defendant seems to laive been taken diffus trial as telereble to a tensuey at will, and therefore patifing him to a position to quit or a demand of possession. Had it been at authorance ouls, eath on the premises by the lessor of the plaintiff would be sufficient without demand of possession; Doe v. Lander, I Stark. C. N. P. 300.

hind the defendant by any disclaimer he might make 100 1 1 3 (1) (1) 1 en his part.

"A determination of the defendant's tenancy must therefore he made out in some other way, or the action would not be maintainable. It has been argued, that the facts of the case showed that the late carl was a which at will early, whose tenancy therefore terminated which his death in 1821; and that the tenanovior the present defendant, if amounting to a tenancy at will of even at mifferance, was determined by the death of Mr. Louis, the father of the lessor of the plaintiff) in 1860. That point was not made at the trial; if it had, the defendant might have been able to prove circumistances amounting to a new tenancy at will, which would have made a demand of possession necessary before bringing an ejectment. It may turn out that the defendant's tenancy was finally determined by Mr. Lewis's death, therefore we cannot grant a rule for a nonsuft, but for a new trial only.

Rule absolute for a new triel.

FARMER against CHAMPNEYS, Bart.

11 13 30

CPECIAL demurrer to a declaration, alleging for The inserting cause that a venue had been inserted in the body, venue in the body of a decontrary to Reg. Gen. Hil. 4 W. 4. No. 8(a).

Chandles in support of the demuser. The penetal W. 4. No. 8 sule cited being made in pursuance of stat. 3 & 4 W. 4. is the anticated being made in pursuance of stat. 3 & 4 W. 4. be 46. a. 1. has the same binding effect as an express rec, but of an enactment prohibiting any venue to be inserted in a judge at declaration. The rule, in fact, is an act of the legis attite it out: lature, providing that the forms of declarations shall

claration contrary to Reg. Gen. Hil. 4

that while the affidavit to hold to bail was for goods sold and delivered, the writ on the face of it called on the defendant to answer the plaintiff in an action on the case, and being indorsed with the amount of the debt.

Cause was shown by W. H. Watson that the writ was not necessarily void, as a person may be held to bail in case on a judge's order. The indorsement is not part of the writ.

PARKE B.—We are of opinion that the writ ought to stand, it being regular; for a party may be holden to bail in case, and the indorsement is no part of the writ; but as the plaintiff cannot have a good declaration on the writ, the arrest is irregular, and we ought not to keep the defendant in custody till the plaintiff shall chuse to declare. The rule should therefore be absolute without costs.

It was then pointed out that the writ was directed to the sheriffs of *Middlesew* as to two individuals, instead of the sheriff of *Middlesex* as one officer. It was answered for the plaintiff that the writ was substantially correct and could not mislead. But

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rain a silver in Ch.

Per Curiam.—This last irregularity is fatal, for great strictness is required in writs. The office of the two individuals is that of "sheriff" of Middlesex.

Rule absolute with costs.

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See Lakin v. Massie, ante, p. 837; Nicol v. Boyn, 10 Bing, 339; Byfield v. Street, id. 27; Hodgkinson v. Hodgkinson, K. B. Trin. 1834, 1 Adol. & Ell. MSS.; Sutton v. Bitrgets, Exchequer, 13th Jan. 1835.

1834.
BARKER

9.
Weedon.



STURBURE around Towns

moved for non-payment of costs.

entra de la casa de la

Personal de- A Rule had been obtained calling on the defendant to party liable to blow cause why an attachment should not issue pay costs for non-payment of costs, pursuant to the master's allomaster | allo: catur, on affidavits showing that the bosts had not been capit is personally demanded from the defendant, out that me essential because party; who went to serve him at his house served his fore an attach, party; who went to serve him at his house served his daughter there, not being permitted to see the defendant, but heating the voice in the house." After came shown, Green v. Prosser (a) was cited in support of the rule. good in all of good one said and in

Lord LYNDHURST C. B .- The hearing the defendant's voice in the house only shows that he was at home at the time it was attempted to serve him. The question remains, whether the service on the daughter was sufficient? And the rule universally laid down in cases. of this mature so nearly affecting the liberty of the milject, shows that it was not. It was absolutely necessary to serve the detendant personally with a copy of the rule and of the master's allocatur, showing him at the same time the original rule, and demanding payment of the costs (b). The court is the more anxious to restate the acknowledged rule, as the case cited might be supposed to authorize a less strict practice. The rule ought never to have been granted.

Por Curian .- Rule discharged.

when her party of the first of the section of the first form, and the R. V. Bichards for, Heaton against the cule.

(a) 2 Dowl. Prac. Cas. 99. (b) Sec Tidd, 9 ed, 990,

ing nyagtan gala samaganya kapapagani nasa kabanta nat

RICHARD against IBAAC. T.



JUDGMENT as in case of monsuis was meved for An analysis.

Juon an affidavit, entitled; if Thomas Danie Isaac at defendant at the suit of John Richard," ... Chilton contended that the suit of the cause was sufficiently designated, but an ability to the plaintiff," and produced by the defendant, deman fee from the describing but that the GURNER Bern The affidavis must be entitled in the read canner, and a deviation from the usual mode of entitling it, as by the plaintiff against the defendant, has nevershown Giren . Post of an war enter in supply and

Chilton took nothing by his motion.

Lord Lynnia Reg (B ee The hearing the defendent's voice in the fanta-entre showerther he was at home of the time if we aftergreed second out to enw reddinger Goven aguinet Liesperbyi w entenner was mounithe

EBT. Common counts for sheep, sold BT. Common counts for sheep, sold, and delin A plea to an action of debt vered by the plaintiff to the defendant, and on an for goods sold account stated between them. Plea, that the defend and delivered, and on an acant was discharged by an order, of the insolvent debt ; count stated, ors' court, according to the insolvent debtors' act, of that the defendant was and from the said several debts and causes of action, if discharged by any, and each and every of them, Special demourer, insolvent debtassigning for cause that the defendant by his plea had ors court, "of not confessed and avoided the causes of action to which said several it was pleaded, and had attempted to avoid without debts and confessing the causes of action to which the same is tion, if any,"is pleaded; and hath by the plea alleged that he was bad on special demurrer, for duly discharged from the said several debts; &c., if hypothetically any," &c., without confessing that there were any such rectly confessdebts; thereby attempting to put in issue several matters ing the cause and rendering the plea double. Also that the plea sought to be neither set out the discharge specially, nor followed avoided.

" supposed" only amounts to " alleged.

Gould U. LASBURY.

the general form of pleading given by the statute (a). Joinder.

Erle for the plaintiff supported the demurrer. The plea is bad. First, it neither traverses the plaintiff's cause of action, nor does it confess it to have once existed, and afterwards distinctly avoids it by matter subsequent; viz., the defendant's insolvency. [Parke B. The rule of pleading is, that the defendant must at once confess the fact or cause of action in respect of which he relies on a discharge (b). Taylor v. Cole (c) is in point. So in Griffiths v. Eyles (d), an action for an escape, the court held that the defendant could not plead hypothetically, that if there had been any escape there had also been a return. Now here the pleadmits the plaintiff's cause of action not distinctly, but hypothetically only.

Secondly, Sheen v. Garrett (e) shows that if an act of parliament prescribe a form of pleading, the party intending to avail himself of it in defence, must either pursue its language or plead in the more special manner required by the rules of law preceding the act. This defendant has done neither. The form pointed out by 7 G. 4. c. 57. s. 61. has no such words as " if any." [Alderson B. He is only discharged from those debts which he admits by his schedule. Is he discharged as to debts which he neither admits nor denies?]

Kelly in support of the plea. As to the first point, there is no doubt that the plea should traverse, or confess and avoid every material allegation. The question

⁽a) 7 G. 4. c. 57. s. 61.

⁽b) See per Biller J. 3 T. R. 298; and 1 Saund. 27, note (1.)

⁽c) 3 T. R. 292.

⁽d) 1 B. & P. 413.

⁽e) 6 Bing. 686. A plea of bankruptcy under 6 G. 4. c. 16. s. 126.

here is, whether the cause of action in the declaration is not substantially confessed by this plea in its present form? And if the words "if any "shall be held so to qualify the plea, as to prevent it from having that effect, , the usual forms of pleas in har of the statute of limitations, infancy, bankruptcy, discharge under the insolvent , debtors act, set-off, partnership in abatement, and in trespass, which have commonly stated the plaintiff's . causes of action or the defendant's trespasses, as " sup-· posed,"(a),pr,";if any," are also incorrect. The object of the rule of pleading is that, there shall be such a confession of the plaintiff,'s cause of action, as shall be sufficient for the purposes of that particular action; wis., to relieve the plaintiff from taking issue or proving ity. It does not require, that, there should be such an shedpte, confession of it, at all events as would be necessary were an issue to be raised on it as to the existence of the causes of action, or as would be available against the defendant in another action. [Aldergive to the words "if any" the effect of a protestation.] Yes, [Lord Lyndhurst C. B. Does "supposed," causes of action mean more than those ... alleged," by the plaintiff to exist?] The terms " if eny," and "if any such there be," are found in the forms of pleas of discharge under the insolvent debtors' acts, 1, G, 4, c, 119. s. 28. (b), and 7 G. 4. c. 57. (c), and under the hankrupt act 5 G. 2. c. 30. s. 7. (d), and 6 G. 4, c. 16. (e), which are usually approved by the profession. Again, in pleading nonjoinder in abatement, where the strictest construction has ever prevailed, the defendant alleges that the supposed promises in the de-

1834. GOULD v. LASBURY.

⁽a) As to "supposed" see per Wood B. in Jones y. Stevens, 11 Pri. 276; Hall v. Blandy, 2 Y. & J. 486; 1 East, 213, 215; 3 Salk. 273.

⁽b) 3 Chitty on Pl. 4th edit. 920. edit. 1825.

⁽e) Id. edit. 1831.

⁽d) Id. 912, edit. 1825.

Gould v. Lasbury.

claration " if any such were made," were made by him jointly, &c. (a) The plea of set-off often contains similar words. The effect of a protestation was to conclude the party making it, for the purposes of the pleading in that action only, the only issue taken being on the particular matter pleaded. Had the replication been general, and the defendant gone to trial on this plea only, could he have disproved or denied the causes of action as laid? or would the plaintiff have been bound to prove them? The terms "if any," " supposed," " alleged," &c., are commonly used to prevent the making any possible use of the admirsion out of the particular pleadings. Gale v. Capern (b) was assumpsit on an award. A plea of set-off stated that the plaintiff made his promissory note payable to A. C., which was duly indorsed and delivered to the defendant after A.C.'s death, by her administrator, and was unpaid. The replication was, that the " sapposed" cause of set-off on the said note did not accrue to the defendant within six years in manner and form, &c. On this issue it was held at the trial, that though there was a subscribing witness who was not produced, the handwriting not only of the maker but of the indorser was sufficiently admitted on the pleadings, and that decision was upheld on argument in the King's Bench.

Erle in reply. The plea is bad, for containing not an unqualified, but at most only an hypothetical admission of the plaintiff's cause of action; now it is a rule in pleading, that the party justifying must show and admit the fact. (c) The judgment for the defendant

⁽a) 3 Chitty on Pl. edits. of 1825 and 1831, p. 900.

⁽b) Easter term 1834, not in print when the principal case was agged, now reported 1 Adol. & Ell. 102.

⁽c) Per Buller J. in Taylor v. Cole, 3 T. R. 298.

on a plea in abatement, being quod cassetur billa, or if for the plaintiff, being only quod respondent ouster, and not that the plaintiff do recover, viz. secundum allepata et probata, no inferences drawn from that form of pleading can affect pleas in discharge of the plaintiff's cause of action. The rule that a defendant is bound to traverse material matters alleged by the plaintiff, of to confess and avoid them, can only have place in pleading in bar; for on a plea in abatement, the defendant is only put to show that the plaintiff may have a better writ. It may be conceded that the word " supposed," is nothing more than "alleged;" but the doubt which its use occasioned in Gale v. Capern, shows that the use of words exceeding it in effect will not be sanctioned. The analogy of protestation does not hold good: for where of several matters alleged in pleading a party was bound if replying, or chose in a plea to traverse or confess and avoid one in particular (a) without assuming to answer the other matters, he might, by way of protestation, exclude them from consideration by confessing them in that action, though for no other purpose whatever—an effect which took place under the well known rule of law; whereas here the defendant, though assuming in his plea to avoid the shintiff's cause of action, does not confess it explicitly as to any part, but qualifies his confession hypothetically. In Gule v. Capern the only question was, what was the issue to be tried? and it was held that the handwritings of the maker and indorser were not in inter being admitted. That had nothing to do with the form of pleading. The plaintiff, before going to trial, was entitled to know what the defendant would traverse and what he would confess, so as to be prepared with evidence accordingly. The difficulty which

Goved O. Lasbury.

⁽a) See now Reg. Gen. H. 4 W. 4. No. 12. p. xii. this Vel.

Gould v.
LASBURY.

arose at the trial of Gale v. Capern, whether the subscribing witness ought to have been called, would have been prevented had the plaintiff specially demurred to the plea for defect in form, as is here done. last plea in Taylor v. Cole, the fact of expulsion justified by the defendant Cole, had been done by Harris a third person, and was not therefore within the peculiar knowledge of the defendant; yet the plea was held bad, because it did not confess an expulsion by the defendant himself. [Alderson B. In Griffiths v. Eyles the warden of the Fleet omitted to confess in his plea, a fact which must be taken to be peculiarly within his own knowledge, that of the prisoner's escape. The court there held the defendant bound to know the state of his prison, compelling him to a distinct confession of the escape sought to be avoided; and held a rejoinder bad for only confessing it hypothetically, " if any such escape so newly assigned was made." In Griffiths v. Eyles the number of escapes was most material; the defendant's knowledge of them was only a presumption of law; whereas here the defendant must have known whether he was indebted or not.

Lord Lyndhurst C. B.—It is difficult to distinguish the expression "supposed" from that of "if any." However, as there has been a decision in the King's Bench, in which a construction is said to have been put on the word "supposed," we will inquire into the particulars of that case, and consider whether or not the term "supposed" is convertible and synonymous with "if any."

Cur. ado. vult.

On a subsequent day, the judgment of the court was delivered by

Gould v. LASBURY.

1834.

Lord Lyndhurst C. B.—The plea of discharge under the insolvent debtors' act was contended to be bad, because it did not directly confess and avoid the matters alleged in the declaration, but merely stated, by way of avoidance of them, that the defendant was discharged from the said causes of action "if any." This court was of opinion, at the time of the argument, that the plea was invalid. A similar point having been argued in the King's Bench, we have conferred with the judges of that court on the subject, and they concur with us in thinking that the words "if any" vitiate the plea. The demurrer therefore is well founded.

Judgment for the plaintiff.

LORYMER against STEPHENS.

A SSUMPSIT by the owner of a ship against his late The agent for captain, for money paid, lent, had and received, a ship proand on an account stated. Plea: the general issue, with duced to the captain an notice of set-off for wages. At the trial at the last So- account, mersetshire assizes, the following facts appeared. The which after debiting him plaintiff, who had been engaged by the defendant to with various command his brig Champion, returned to Bristol, after to the use of a year's service in that capacity. Upon that occasion the owner, and the plaintiff's brother produced to the defendant a him for debtor and creditor account, the balance of which, warious payments on after debiting the defendant with 730%. for sums re- account of ceived by him for the plaintiff, and crediting him for the ship, showed a various disbursements, was in favour of the plaintiff balance

crediting against him. To that ac-

count the captain assented and signed it. The agent then produced another account of the captain's claim on the owner for wages, to which, as there stated, the captain refused assent. The first account was the only evidence of money had and received by him to the owner's use. In an action against him by the owner, both accounts were produced. Held, that the admission by the defendant on the first account of sums received to the plaintiff 's use, conclusively proved the plaintiff to be entitled to recover on the count for money had and received; though semble under the circumstances, it was not evidence on the account stated.

a palatice of the against the merch assent to it, and said he must loc return it next day, but did not do se opinion, that these accounts (whi evidence) afforded no proof of an tween the parties, and nonsuited the in Easter term for a new trial, ar above facts, urged that though the opened on the account stated, he had on the count for money had and rece hurst C. B. The effect of the evider. the defendant admitted a balance of him on the money account, while noth stated by him as to the balance of Then his admission of the first acc the onus of discharging himself claimed against him, provided the the count for money had and receiv the plaintiff's case was opened as stated, yet when his evidence showe so relied on was not complete, he n claim on the count for money had rule having been granted for a new 1 production of the accounts,

Follett showed cause The who

recognition of the state of accounts in the former paper, as it must have been affected by the statements to which he objected in the latter. Then it was all one transaction; as much so as if the accounts had been stated on two opposite pages of a ledger, to one of which the defendant assented, while he disputed the other. [Parks B. Supposing the plaintiff cannot avail himself of the account stated, the count for money had and received would be supported by the defendant's admission of the sums received by him to the plaintiff's use, which are much larger than the balance claimed.] Still as the ultimate state of the account between the parties depends on both the statements into which it was divided, it is but one transaction; and the question remains, whether the defendant, having disputed the correctness of the second part of it, can be taken to have admitted a claim against himself on the first, considered singly.

LORYMER v.
STEPHENS.

Erle contrà was stopped by the court.

PARKE B.—The defendant by signing the first account, distinctly admitted that the 700*l*. had been received by him to the plaintiff's use. As that admission stands perfectly independent of the account stated, the plaintiff may recover on the count for money had and received.

BOLLAND B. concurred.

ALDERSON B.—A particular account of charge and discharge is struck between the parties, and signed by the defendant. Surely it is sufficient to entitle the plaintiff to recover, that that account contains various items of money received by the defendant to the plaintiff's use.

GURNEY B. concurred.

Rule absolute.

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1834. \sim

> LEWIS against THOMAS ROGERS, Executor of ELIZA-BETH ROGERS, deceased.

A trader and small farmer being embarrassed in her affairs and pressed by a creditor, assigned "all her effects, stock, books, and book-debts," for the benefit of her creditors, and at the same time dictated a list of persons whom she stated to her estate. The assignee having dealt with the property after her death, was sued by one of her creditors son tort: Held, that the list was evidence as part of the transaction of the assignment in order to establish the bona fides of it, and so justify the defendant's intermeddling.

Held also, that cattle on the farm passed by the

A SSUMPSIT on a promissory note made by Elizabeth Rogers for 101., dated 4th December 1830, and on the common counts, and account stated. Pleas: first, non-assumpsit; secondly, ne unques executor; and thirdly, plene administravit. At the trial before Gurney B. at the last assizes for the county of Carmarthen, it appeared that the promissory note was given for money lent by the plaintiff to the deceased, Elizabeth Rogers, who, in February 1831, kept a shop and small farm at Pembrey; and evidence was given of assets to the amount of 2001. in the defendant's hands. For the defendant, it was proved that being embarbe creditors of rassed and pressed for debt due to some Bristol creditors by letter from their attorney, dated about 17th February 1831, which was produced, but on objection, withdrawn, she took the advice of the clergyman of the parish, who, having from her books ascertained the state of her accounts, prepared the following assignment as executor de of her effects to Thomas Rogers for the benefit of her creditors, which she signed.

"Having received a letter from Mr. G. T. on behalf of M. & Co. of Bristol, threatening to commence legal proceedings for the recovery of 351. 3s. 10d. which I could not liquidate by the time specified, in constquence of ill-health; under these circumstances, with a view to do justice to my creditors, I have been induced to suspend business, and I do hereby suspend business accordingly; and as you are my chief creditor word "effects." to the amount of 501. 16s. 7 d., I do by this writing surrender, deliver up, and assign the whole and every of

my 'effects, stock, books, and book-debts' to you as trustee for and on behalf of my other creditors.

Your's truly, E. Rogers.

Pembrey, 17th Feb. 1831.

To Mr. Thomas Rogers, grocer &c.

Village, Pembrey."

The shop was immediately shut. On the next day a notice of distress for rent was served on her, under which her mare and four cows were sold on the 23d. This notice was produced in evidence by the clergyman. Notice of sale had been given about the end of February, but the actual sale was postponed on account of the precarious state of health of Mrs. Rogers. She died in the house on 2d April, in possession of shop goods and furniture, worth about 2001. which on her death were taken possession of by the defendant. the trial, the defendant offered in evidence a list of creditors made out by the clergyman at the dictation of the deceased at the time of executing the assignment, in order to inform each of the assignment made. and also some of the letters which had been actually The plaintiff's name was not in the list. The defendant had acted in getting in the testatrix's debts and in disposing of the stock, giving receipts, purporting to be "for the creditors." For the plaintiff, it was objected, first, that to prove the distress, the bailiff ought to have been called to prove the notice, and that if it was not properly proved, the property in the cattle remained in her till her death, and was not included in the general words of the assignment; and the defendant was liable as executor de son tort, for having intermeddled with the goods. that without the letter of 17th February, there was no evidence that the deceased owed any thing, and that to make the assignment valid, it should be shown that other creditors pressed for their debts. Thirdly, the LEWIS v.

Lawis

list of creditors, as well as the latters prepared ! clergymen, were not evidence; the first being 1 hearsay taken from the mouth of the deceas colour the transaction. The learned beron to jury, that if the defendant had taken possession goods without title under the assignment, he w executor de son tort: and as to the fairness or of the assignment, he left the case to the ju the evidence of the clergyman, saying, that if believed it they would give a verdict for the defer As to the animals sold under the distress, he held if it was a regular distress, the title to them was vendee; if irregular, in the defendant under the a ment: but in neither case in the defendant as exe so that that point was immaterial. The jury l found a verdict for the defendant on the firs second issues, were discharged from finding any last (a).

A rule for a new trial having been obtained difficulty in Easter term,

Chilion, Whiteombe and James now showed a Edwards v. Harben (5) has been misapprehe [Alderson B. The goods there were suffered to n in the hands of the debtor by agreement dehor bill of sale.] Here the shop was closed and not sale given, so that the fact of the assignment coul fail to be notorious in a small village like Pen The existence of creditors, as also the assignment them, was sworn to by the clergyman, and the believed him. Here the court stopped them.

⁽a) For the verdict for the defendant on the plea of non-assumpsi entitle him to the posten and costs, even if the issue on plene admis had been found for the phintiff; Garnous v. Hesteth, E. 22 G. 3 980, n. (f), 9th edit.; see also 4 B. & Ahd. 254; & Tannt. 729.

⁽b) 2 T. R. 587; approved by Laurence L. Steel v. Breun, 1 382; see, however, per Dallas C. J. Steward v. Lamb, 1 Rs. & Bin See Shitty jun. on Contracts, 325. 2d Edit.

J. Evens and Powell contra for the plaintiff. list of creditors was improperly received in evidence; then it is impossible to any how far the jury were binseed by it in their verdict. That list was hearsay, being dictated by the deceased, so that her declarations are not evidence for the defendant, who claims under her, to prove that creditors existed, and the assignment was valid. The list does not contain the plaintiff's name, nor was it evidence to show that he knew the assignment. [Lord Lyndhurst C. B. The question of frand has been disposed of by the jury.] Nor did the mare and cows pass under the general word "stock" in the assignment, which, as there collocated, means not eattle but stock in trade. "Effects" must mean articles ejusdem generis' with those afterwards enumerated. Lord Lyndhaust C. B. That rule applies when the general words follow particular words.] Why prove the distress at all if the assignment was relied on? They also said that the letter of the attorney, having been suffered to be partly read, might have had effect on the jury.

LEWIS U. ROGERS.

Lord Lyndhurst C. B.—All observation as to receiving in evidence the letter written to the testatrix by the creditor's attorney, is answered by the fact that the judge allowed the objection and stopped it from being read. The list of creditors was properly admitted in evidence as part of the transaction (a) by which the testatrix, who dictated it, at the same time assigned to the defendant her effects for the benefit of all her

⁽a) Declarations cotemporaneous with an act are admissible to prove the fatent of that act, e. g. declarations of a benkrapt on denying or absenting blanch in order to prove his insent to delay a creditor, avoid his creditors, as 2 Stack, on Ev. 94. 2d edit. So a conversation at the time of excepting a deed is evidence as part of the transaction, Murray v. Earl Stair, 2 B. & Cr. 82; Johnson v. Baker, 4 B. & Ald. 440; Jones v. Jones, ante, was HT. 890.

A CONTRACT OF MANAGEMENT OF THE PARTY OF THE

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Lewis v. Rogers.

creditors, not to show that it contained the names of a her creditors, but that at the time of the assignment at represented the persons named in it to be her creditor. It was evidence then on the question whether the assignment was a bona fide or fraudulent transaction. I am also of opinion that the words of the assignment is cluded the cattle; its object on the face of it indicates the intention of the testatrix to part with all her property for the benefit of her creditors; and it states the she suspends her business, part of which was the management of the farm, to which the cattle belonged

Bolland B.—I am of the same opinion. No er dence of the letter was in fact admitted, except as fi as it appeared from the assignment. The list of cri ditors was good evidence to show the bona fides of th testatrix; being prepared under her direction by th clergyman, whom she had called in as a friend. an who acted as her clerk on the occasion of her bein pressed by the Bristol creditor. By his advice, sh summons the principal creditor and persists in a signing all her property to her creditors, requesting him to act as trustee for them. All these facts wer evidence on the question of fraud or not in the at signment. The word "effects" comprehends the cattle and whether the evidence proved a lawful distress i not here the question, for if they passed under th assignment the defendant had sufficient title, and wha was said at the trial falls to the ground.

ALDERSON B.—I agree. The plaintiff established a primâ facie case against the defendant as executor do son tort, by shewing his intermeddling with testatrix's goods. Then in order to justify that intervention and to show a title to the goods, the defendant proposes to show that the testatrix in her lifetime bonâ fide as

signed them to him for the benefit of her creditors. order to establish that defence he begins by offering in evidence a letter from an attorney pressing the testatrix for payment of a debt, to show her motive for assigning her property to her brother-in-law, the principal creditor. That letter was withdrawn as not being evidence, but being referred to in the assignment itself, which was next produced, came properly before the jury in that shape as a declaration by the testatrix that she had received such a letter, being made contemporaneously with her act of assignment. ist was produced, taken down from her dictation by the clergyman who, at her request, prepared the accignment, and purporting to contain the names of , some of the creditors in whose favour she purports to make it. The question being, whether the list was admissible in evidence, and if it was, for what purpose, I am of opinion that it was so admissible, as forming gest of the transaction of assignment, in order, by showing the circumstances under which she executed to prove that it was so executed bona fide. It was the plaintiff to show mala fides, if any. The assignment having been found to be a fair transaction, passed the property. That was the object of the instrugreat, and "effects" is a very large term (a) to which the most extended sense should be here given. If it . comprehended all, the validity of the distress becomes immaterial.

GURNEY B. concurred.

Rule discharged.

(a) See Dos v. Dring, 2 M. & S. 454; Twigg v. Potts; \$ Tyr, 967; Elegen v. Jackson, Cowp. 304; Pitt v. Show, 4 B. & Ald. 206.

LEWIS V.

1834

IN THE HOUSE OF LORDS.

Between Sir WILLIAM HORNE Knight, His Majesty Attorney-General, Appellant; and WILLIAM Horn JAMES WOOD, and JAMES BRIERLY, Respondents.

CASE OF THE APPELLANT.

Probate duty is not payable under 55 G. S. c. 184. in respect of peran English testator domiciled and dying in England, which being locally situate in a foreign country at the time of his death were not brought hither till after that event by his executors, though they had obtained au English probate in respect of his personalty situate in England, and proceeded by virtue of that probate to collect and administer in this country the whole of the assets.

TOHN MARSHALL, late of Arthoick, near Man chester, in the county palatine of Lancaster, was for many years previous to and at the time of his deal sonal assets of resident and domiciled in England at Ardwick after said, and had no other place of residence or domicit John Marshall was a merchant trading with North America, and at the time of his death was possessed of or well entitled to very large personal estate and effects, amounting together to 300,000l, and upwards part of which personal estate and effects was, at the time of his death, situate in this country, or on the high seas, and the residue thereof was, at the time of his death, situate in North America, and consisted party of goods and effects belonging to him, and which had been sent by him to North America for sale, and were then remaining in the hands of his agents and unsold, at New York and elsewhere in North America; and partly of book debts and other simple contract debts dat and owing to him from divers persons at the time of his death, domiciled and resident in North America; and partly of monies in the public funds or stocks of the United States of North America, and in the funds or stock of the state of New York, in North America, standing partly in the name of the said John Marshall and partly in the name of his agent there.

The said John Marshall duly made and published in his last will and testament in writing, and a codicil thereto, bearing date respectively the 22d day of Asgust 1823, and the 15th day of May 1824, and he appointed the respondents, William Hope, James Wood and James Brierly, executors of his said will and codied. The said testator departed this life on or about the 19th day of July 1824, without having altered or revoked his said will or codicil as to the appointment of executors; and the said executors, on the 28th day of September 1824, applied for and obtained probate of the said will and codicil in the proper ecclesiastical court in this country, for the purpose of administering the whole of the said testator's personal estate and effects, or so much thereof as required probate for the surpose of being administered by the said executors, and as being the proper probate for that purpose; and the said executors paid for duty on such probate the sum of 675L only, and a stamp is impressed on the said probate for that amount and no more. The duty so paid by the said executors on such probate was in respect only of such part of the testator's personal estate and effects as was at the time of his death situate in this country or upon the high seas, and which was under the value of 50,000%; and the said executors have never applied for or obtained probate to be estanted by any other court or jurisdiction, and have mever applied for or obtained any other probate than the probate hereinbefore mentioned.

The said executors, by virtue of such probate, proceeded to collect and administer and have in fact collected and have administered in this country the whole of the personal estate and effects of the said testator, whether situate in this country or elsewhere, at the time of the said testator's death, or the principal part thereof, to the amount of 300,000l. and upwards.

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. The said executors have never applied to the commissioners of stamps to pay, and have never paid any further duty in respect of the testator's estate and

ATTORNET - GENERAL II.





1834.

Horz and Others. effects, in addition to aforesaid, and which d the debt owing to his n duty upon such part of as was, at the time of h or upon the high seas, satisfy any duty upon a and effects of the testat death, situate in North

tors, at the time of the time when they took or aforesaid, were resident have ever since reside

and are domiciled in thi On the 9th day of M nev-general filed an info duly amended, on the e of Exchequer, against stating, amongst other fore stated, and praying a debt arose and beca respect of probate duty personal estate and ef cluding as well the per said testator, which, a this country or upon t estate and effects whic that such debt, in reand effects of the said were in America, was pa to his majesty, and that of the testator's personal by the said respondents cessary accounts might | testator's personal estat

death, were situate in America, and of the amount of duty which accrued due to his majesty for probate duty upon the probate, which ought to have been taken out in respect of such personal estate and effects; and that the said respondents might be decreed to pay the amount of duty which, upon taking such accounts, should appear justly due and owing to his majesty: and that the said respondents and each of them might be restrained by the injunction of the said court of Exchequer from further administering the said testator's estate and effects, or from intermeddling therewith, until the said duty should be ascertained and paid; and, if necessary, that a receiver might be appointed of the outstanding personal estate and effects of the said testator, with all proper directions; and that the said respondents might be decreed to pay the costs of the suit. And for general relief.

ATTORNEYGENERAL

v.

Hope
aud Others.

The respondents appeared to the said information, and on or about the 21st day of May 1833 they filed a general demurrer thereto.

The said demurrer was set down for argument, and came on to be heard before the judges of the court of Exchequer at *Westminster*, in *Trinity* term 1833, when their lordships, by an order dated the 3d day of *June* 1833, allowed the said demurrer.

The appellant is advised that the said order of the court of Exchequer is erroneous, and ought to be reversed, and that the said demurrer ought to have been overruled, for the following, amongst other

REASONS:—First, because by the true construction of the acts of parliament by which probate duty is chargeable upon the personal estate and effects of deceased persons for or in respect of which probate shall be granted, such duty is chargeable and ought to be paid upon all the personal estate and effects of a testator wherever situate at the time of his death, when probate

HOPE and Others. is granted in this country, and which are collected and got in by such executors, and are administered in this country by them under the probate....

Second, because in this case the executors having taken possession of the whole of the personal estate and effects of the testator, and having administered the same in this country under and by virtue of the probate, the whole of such personal estate and effects, including so much thereof as was situate in Americs & the time of the testator's death, must be taken and considered as the personal estate and effects for or in respect of which such probate was granted, and therefore liable to probate duty.

Third, because the said respondents not having paid probate duty upon, or rendered an account of any part of the personal estate and effects of the said tea. tator, which were at the time of his death situate in North America, and which the defendants, by their demurrer, admitted to consist partly of book debts and other simple contract debts as alleged by the bill, such demurrer ought not to have been allowed, but that his majesty's attorney-general was entitled in respect of such particulars, at least, to a discovery by way of answer, and to an account or inquiry as to such perticulars by the decree of the court.

> (Signed) William Horne.

John Campbell.

The demurrer was never argued in the Exchequer, but judgment was entered there for the present respondents, sub silentio, on the authority of The Attorney General v. Dimond (a), it being understood that their object was to have the principles of that decision reconsidered on appeal, which could not be done in that case itself for a technical reason (b).

The Attorney-General (Sir John Campbell) for the appellant, (25th July.) The testator was domiciled in England, appointed executors resident there, and his stoperty in America being personal had no situs, but attached itself to his English domicil (a). The proceeds of his goods, stock, and book debts, locally situate in America at his death, have been received by the respondents in England to the amount of 250,000l. more than the sum in respect of which probate duty was paid. The question therefore is, on what sum that duty was payable? Ewing's case(b) shows that legacy duty is payable on a bequest of stock in foreign funds by a party domiciled in England. It was there extra-judicially thrown out, that the probate duty would not be payable in a case like the present; an opinion which was followed up in The Attorney-General v. Dimond (c). That case could not be carried further by appeal, no leave having been given to turn it into a special verdict (d). appeal is intended to review that decision. By 55 Geo. 8. c. 184. Schedule, Part the Third, duty is imposed on "probate of a will and letters of administration with a will annexed, to be granted in England, where the estate and effects for or in respect of which such probate, letters of administration, &c. respectively shall be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, shall be above the value of 201. &c." Section 37 provides, that every person who shall take possession of, and in any manner administer any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration of the estate and effects of the deceased, within six calendar months after the deATTORNEY-GENERAL 2.
Hope and Others.

⁽a) See Bayley B's. judgment in Re Ewing, ante, Vol. I. 106.

⁽b) Ante, Vol. I. 91. (M. 1830.) (c) Ante, Vol. I. 243. (H. 1831.)

⁽d) Id. 286.

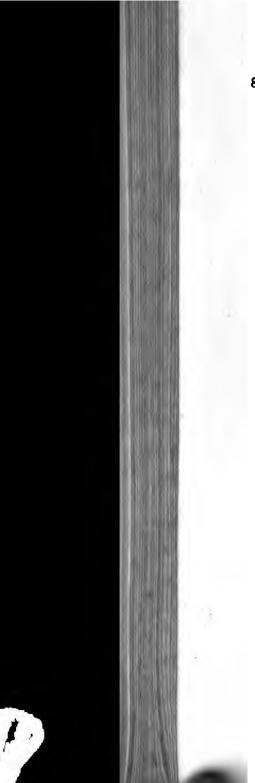
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ATTORNEY-

GENERAL

Hörk

and Others.



cease, &c.) shall threat 'the dut' in respect of." per being abroad ability deat to Ingland I it is spore whole "the in by wanting

whole. "Again, by section person shall grant proba without first requiring a applying for the same, a effects of the deceased 1 probate or letters disa grunted exclusive of wha possessed of or easitled and how beneficially; are sum to be therein specific to any part of the good without iprobate. 11 Awy under section 58 in esti abroad is met by section creasing the duty accordi the testator's goods been respondents have interm bate, except under their they have maintained to vens (a) and Carr w Rob ducing the probate for been nonsuited for wan When the property arrive personal representative only be dealt with by pre und another; assignees o all of the today a sign as

^{(4),} Taunt 113, see 2, M. & trial is now, 12th January 1835 in Montgomery v. Ashby and school

⁽b) 2 B. & Ad. 905. A new was imposed, and the plaintiff rec

and others (a) was not cited in The Attorney-General w. Dimond, and is in point to There, a testator appointed persons resident in India and Scotland, his executors, The will was not proved in Lingland: The executors residing in India having remitted money to their agent in England, a creditor of the testator filed a bill against that agent, praying an account, and peyment of the money to the accountant-general for security. A den murrer was put into the bill stating that a personal representative of the testator resident within the jurisdiction of the court was a necessary party to jit, and that there was no such personal representative so resident a party to it. The demurrer was allowed and the Vice-Chanceller, more particularly relying on Humphreys v. Humphreys (b), held that the gourt of Changery could not act in allowing an account to be taken of such approperty, unless a personal representative was before the court. The consequence is, that as probate could only be granted under section 384 probate duty must be paid on the whole. Logan y .. Fairlie (t) follows up the former case: There the testator, a major in the East India Company's service, resident in India, and having all his property there, bequeathed his residue to II. L. resident in England, or, if she died before him, to her children; and appointed executors netident in India. The will was proved in India, and the residue remitted by the executors to their agent in Mingland, with directions to pay it to. " II. L. or her children." They having filed a hill against the agent to accure the fund, it was held liable to legacy duty, and that administration should have been taken out to the testator in this country, and the administrator made a

ARTORNED GENERAD V. HORF: and, Others.

⁽a) 2 Madd. R. 101. (Sir Thomas Plumer V. C. 1817.)

⁽b) 3 P. Wms. 349.

⁽c) 2 Sim. & Stu. 284, 291. Leach V. C. 1825, observed on by Alexander C. B. in Re Ewing, ante, Vol. I. 103, and by Bayley B. in Re Bruce, ante, Vol. III. 479.

proprieted assets, then such sidered as administered in E daty is payable in respect of case of Jamory v. Scaley & rather in point for them agains Brougham C. The testator is been demiciled at Napoles. was, then, as he had made a ! there according to the castoms no property in England, the moder which it was somethe to had preved at Napics account have no effect, and to be us 🛥 tatte died and left an estage in Femmer: was a said by Mrs. I will of Feyner, late of Jamaica have in the presognitive occurs of ecuter having appeared under tion, the first article of Mrs. You in substance, that the decreased his death necessarily in the pro-

a value of 51, and opwards, sufficient of the court. The second center, proved the will in James the recovery of Canardows, and

and is in possession of them. The third stated the Bequest: the fourth, that the legatee was advised th file her bill in Chancery to compel payment of the legacy, but was prevented from so doing on account of there not being a representative to the deceased in the prerogative court of Canterbury; that by the invariable practice of Chancery, no proceedings can be had or instituted therein against an executor for rendering an account or recovery of a legacy bequeathed by will, unless the will be first regularly proved in the prerogative court, and a legal personal representative be appointed the testator by such court. The allegation was rejected and the prerogative probate refused. **Nicholi** gives this account of the case in his judgment in Bearth v. Bishop of London (a): "In Yockney v. Fog-Mer, in which I was of counsel, the party applied for a prerogative probate, the jurisdiction was denied, and was propounded in an allegation. The only effects within the province were brought there after the death of the party. Sir William Wynne rejected the allegation on the ground that such goods did not found the jurisdiction, and said, that though it was stated in argument that the probate was necessary in order to file a bill, yet he could not grant it on such an assertion, but if the court of Chancery had actually decided that the prerogrant was necessary, this court, in aid of justice, might allow the grant to pass." Sir John Nicholl adds, * That case only shows, that for the sake of furthering fustice the court would not withhold its probate." appears then that Sir W. Wynne rejected the allegation on the ground that it did not sufficiently appear that a esurt of equity would require a personal representative in respect of the estate remitted hither. But when he says that if it was actually decided by the court of equity to be necessary, the grant of probate might be

ATTORNEY-GENERAL V. Hore and Others.

(a) See 1 Hagg. R. New Series, 636, 687.

of Chancery. The court of Exchequer, on my sending them a case us to those defendants' liability to legacy. duty; examined the grounds of those decisions (a), and. certified to me adversely to the payment of that duty. Ishad then the assistance of Lord Plunkett the Lord Chancellor of Ireland, and we agreed with the court belowiin distinguishing the case before the house from them. but In The Attorney-General v. Jackson, Fortes, and others, this house considered the estate and wound up there before remittance hither: A distinction may be made beweed stock in foreign funds, as in Ewing's case (b), and debts due ito autestator from persons resident abroad; which latter may be considered as having been contracted in England: As between one diocese and Takethely personalty consisting of simple contract debts by considered liable to probate in the diocese where it is -foundly if consisting of a specialty, it is so liable where it is found. But the broad principle is, that the testator having domicited here, all his property received here by -his executors resident here, must be referred to the sweet's domicil, and ought to pay probate duty.

ATTORNEY-GENERAL U. HOPE and Others.

Isymmetric. The Attorney-General v. Dimond, whether personalty of a testator, which being at his death in a difference ountry, is afterwards brought here by his exementer setting under English probate, and administered likeweres parts of the assets, is liable to probate duty? Institute a different question from one, whether property blockly situate abroad is liable to probate duty, though must brought here, supposing the executor to have the power to do so. Personalty is considered to be situate to the domicil of the party is. But in The Attorney-General v. Dimond, the distinction which was taken as

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⁽a) Ante, Vol. II. 354. (E. 1832.)

⁽b) Ante, Vol. 1. 91.

province. Here, the foreign assets v v. Luker (a), situated in Ireland, wl be taken out. So, had the assets vinces of England, probate woul out in both in respect of the amou Brougham C. I have no doubt tha is necessary. My doubt was, when tive capacity being once conferred, entitled to proceed under it; but f v. Stevens, that he cannot give evic sentative character quoad the fund, of it which he seeks to recover is valorem stamp on the probate, wh stamped instrument quoad the sur and 38. show, that as before the ex law as such to recover the asset probate, so it will not be granted v the value of the property. Creditor compel the executor to account as extend or might have extended bu but he will not be recognized as sucl out probate in respect of somethin beneficially entitled to. Probate du been paid on a part of the assets,

situate here, but entitled to property in a foreign, country to a larger amount, probate is by the stamp laws to be granted only in respect of the assets in England, or of those in America also? Originally, if a party made no will, the ecclesiastical court had power to administer, and as a will ousted that power, it was afterwards thought necessary that the instrument having that effect should proceed from the same court. Its grant of probate then is only an exemplification or certificate that that court is satisfied such a will has been made as ousts its right to administer. But the jurisdiction to grant probate depends on the existence. of the property within the particular ambit in which, the court has jurisdiction. For if it be wholly in the diocese where the testator dies, the bishop of that diocese must grant probate; if in other dioceses of the same province, the archbishop. Suppose then a testator has property worth 20,000L in two dioceses of the province of Canterbury, and property worth 10,000%, in Ireland, a Canterbury prerogative probate would be granted for the English property, and a probate in Ireland for the assets there situate. Suppose the Irisk assets to be afterwards brought to England, and the executor in England to sue here for them, what duty must be paid on the English probate, in order to enable him to maintain his action, and must he pay duty on the whole amount? No Irish or Indian prohate can be recognized here for this purpose, more than as a sentence of a competent foreign tribunal; and if so, according to the argument for the crown, an executor must have probate here for all Irish assets brought hither, and vice versa, though that would involve the paying duty twice over for the same assets. If the doctrine of the courts of law, that an executor who sues as such for 1000/. shall be nonsuited where the probate stamp is only for 500L, is applied univer-

ATRONDET-GRHERAL U: Hors: and Others ATTOMORET-GENERALI Hosti

flored word. Theire areas from the sone of the second states caribe 5001 pared for mare bet for more cheld the table to take alo al wat be confo, conti where the value of questions as it trasts stage believelved thrube sufficer shape with bispection to destampost which be win is anotion with hepricial Bud if the safficiency hardness to suppose is to be tested by the fact, whether it is sought to recon staden higher for lewer dain would be represented by the stamp spectured then and executed may he a succession of detions, each throught for a sum develed by the put bate, finally recover a count unimitely large entageth for which duty has been suid! All that Hungvisters decided was, that where it appeared on the probate this du ty what been baid the amaller sumoth air the execu ton was show sunne for there being word out that the whole was in this country at the third of brancing his bate, the court could not look on that the electrical the executor could how redover. The same would have have been broughs here by appeal! It torned eather o 9 rdz 10 TM. 30 b. 25 lostoto. which lend cts mit han swittener statup is necessary for day deed 86. 400 bich recen deed, instrument, or writing thall be pleaded or gree in evidence in any court, or admitted in any court sa t available therein, until the vellum &couch which suc deed &c. shall be written or made patial of stained with a lawful stamp (w) in Now the daty on problem was originally imposed by 5 W. & M. d. 21 14 3. Min "For every skin or piece of wellum &d. on which an probate of a will of letter of administration for the estate dbove the water of 201 with the ingressed a written, the sum of test' Now her sould se ables under this act, whicher the probate was granted birt estate of 200. or 100014 prother larger sum! withesi's the change of unwotion as hy Hate was selected ?" [Don't bjection would have more force if the given a seek in Brougham C. The want of more particular expression in the act might loccesion great hardship. I Suppose there had been an act of administration abroad, which under the law of the country, where the assets were situate... occasioned the ipayment of a duty there equal in amount to the English, it would be hard to compel the same process to be gone through in this country at a renewed expense... Had the act stated that the duty should be paid, "wherever the personal property, is situated no difficulty would have arisen.]. The method of imposing the duty adopted by 5 W. & M. c. Al. s. &. was continued till 1815; when the legislature intended to remedy this state of the law by 55: G. 3. a. 184. s. 38. which compels an affidavit of the amount of property for which as probate is required. That oath is meant to be conclusive of the amount of duty to he paid subject to the correcting any error which may eventually appear, [! [Lord, Brougham, C., If the oath is so far conclusive, still under 55 G. 3. c. 184. s. 48. the respondents may be liable to penalties for not paying up, the additional duty on the American assets, provided that probate ought at first to have been taken out in respect of them, I I do not receive The Astorney. Esperaling. Dimond as authority, though entitled to smeet mespecti hecause it was never acquiesced in and would have been appealed from had the state of the regard; admitted, \(\) To Eving's case no such considerations attach, and it is entitled to great weight. But supposing the rule laid down in The Attorney-General ye Dimend to be correct, a man domiciled in England might, during a long illness, transfer his English into foreign stock, and then on his death here no probate duty mould be payable, though he was demiciled in Regland, and appointed executors resident here. In That objection would have more force if this were a case of

ATPORMET-GENERAL 2. Hors and Others

duty on the probate is only impose fund which the executor or admin in a province of this country by fo or administration obtained in Conte so that though there may be a grea the county of York, the duty on tha till an administration is taken in the and vice versa; and it is only on the sums in those parts of the country w granted by force of that particular our constitution is confined to particu the duty is payable; for where 55 Ge dule, Part III. directs the letters of says, 'where the estate or effects fi which such probate &c. shall be gra evidently confining the charge on the particular estates to be recovered of that administration; but when it spe duty, it is charged on the amount of t be handed over on the receipt, which save himself from the penalty of 36 ought to take before he pays the n doubt therefore, in that particular

(a) was pressed on the court. But assuming that party suing as a representative, must show that he is clothed himself with that character by virtue of lministration granted by some competent authority this country, the question here is, not whether he as done so, but in respect of what property is the strument conferring or limiting that representative paracter granted? and what probate duty should have een paid at the moment it was granted? That depends 1 the words of 55 G. 3. c. 184. Schedule, Part III. There there are assets in a foreign country as well as this country, probate duty is not of necessity to be aid on the foreign assets; for if it is all duly admistered there without ever being brought here, it is ot contended that probate duty would be payable Now though by sect. 43. a mistake in the exestor's first estimate of the amount of the assets may e rectified by him, there does not appear any power rectify such a mistake in consequence of any thing. g. the bringing foreign assets to this country, occurig after payment of that duty which was the right uty at the time the grant of probate was made. lothing in the act makes a fluctuating duty payable respect of the locality of the property varying from me to time. The form of affidavit required by the cclesiastical court in pursuance of sect. 38, is of the alue of the estate which the deceased died entitled to, and for or in respect of which a probate of the will to be granted." No difficulty remains how to ascerain whether the assets are administered in the foreign ountry where they are, or are brought hither; for hat was a fact contemplated by the legislature, as apable of being ascertained at the time of making the ffidavit. [Lord Brougham C. The principle on which he judgment in The Attorney General v. Dimond pro-

ATTORNEY-GENERAL V. Hope and Others.

and personal representative by fo court does not confer the power nistration, but recognizes him a whom the testator directed to r can have no effect on the admin perty here or abroad. I have man's personalty to have no situs if A. dies in the diocese of Norvei resident in another diocese of the considered as situate in the dioces that is the principle by which part administration is granted; it may ing, that though to give a general quired that there should be bons n district, yet when once the jurisdicti of probate may have universal effe the will, and will enable the repr comes into the court of Chancery abroad and distribute here all the f grant of probate is only in respect within the jurisdiction of the cou die in England, possessed of good worth 10,000L, and of other good

been done. The question remains on the words of the schedule of 55 G. S. b. 184; what are " the estate and effects for or in respect of which administration is granted." Nothing shows that it was intended to include any other property than that situate within the ecclesiastical jurisdiction, which should grant probate at the time of such grant."

ATTORNEY-GENERAL

HOPE
and Others.

Wigram on the same side. No question is here to be argued, whether debts owing by a person in America to another here, were to be taken as property there or here. The act $55^{\circ}G$. 5° e: 184 $^{\circ}$ is penal; and must therefore be construed strictly. Domicil decides the question of legacy duty; Ewing's cases(a) In se Bruce (b), was precisely the reverse of Ewing's rease, and the domicil being American, it was held no legacy duty was payable. That being the law, can any analogy be drawn from it in a case of probate duty! Now the terms in which duty is imposed on legacies, seem to contemplate a certain: particular: class: of persons, without intention to impose duty on foreign property. Now the probate duties are imposed on the estate or effects, in respect of which probate, &c. is granted." What they are, can only be known aliande, and from the law of the courts at the time of passing 55 G. 3. c. 184. Yockney v. Foyster (c) distinctly applies, and the practice of the present day is to grant probate in respect of property baving a certain situa only. Where a person died possessed of property, in neveral dioceses of a province, strictly speaking probate must have been granted by the ordinary, in each, quosd the assets situate there, had not the prerogative probate been provided. Probate is granted simply to show the admission by the ordinary, that his right

⁽a) Ante, Vol. I. 91.

⁽c) 1 Hagg. R. New Series, 6867

⁽b) Ante, Vol. II. 275.

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debts due to him abroad, the ordi have taken steps to levy them.] 1 could at any time levy them out o questionable. But suppose asset country from Ireland, after probat be liable to pay a second probat can be recovered in this country? looked to in The Attorney Genera the actual situs of the assets at the the place at which probate duty i fact, that when executors sue by f courts require it to be proved by 1 probate, only shows that they rec by evidence of a particular kind clesiastical court has confirmed pointment under the will, as eviden to sue. [Lord Brougham C. In 1 Carr v. Roberts the representative clothed with that character to the a on the probate, and no further.] racter as representative was neve and supposing he had paid proba assets for which he did not sue as to nea the muchate to one on trictes

in the testator, no duty is payable. The demurrer admits the facts stated in the information, but not inferences of law. The English probate has scarcely been ancillary to realizing the American assets in America, which was effected under the will by virtue of an American probate; and the proceeds, when they arrived here, were not like debts collected here, which might be considered bona vacantia, but came to the executor's possession under the foreign probate.

The Attorney General replied.

The LORD CHANCELLOR.—My lords, in considering this case, which comes by appeal from a decision of the court of Exchequer, it is necessary that I should remind the house, as I did on a former occasion, of The Attorney General v. Jackson (a). That was a decision appealed from, which took place in a court entitled to the greatest respect, not merely in reference to the matters which more ordinarily come before the courts of this country, but in reference particularly to matters of revenue, inasmuch as their legal jurisdiction leads them especially to the handling questions of that description. It was upon that ground I felt, though there were certain doubts in my mind on a comparison of the cases of The Attorney General v. Cockerill, The Attorney General v. Beatson, and other cases, with the decision of the Exchequer in Jackson v. Forbes (b), which was a case sent there from the court of Chancery. that it must be, as I then stated, a very clear opinion, by every one confidently entertained, and without any hesitation, that should entitle me, and therefore incline me to advise your lordships to differ from that court on a solemn judgment delivered, after hearing all which could be urged on both sides. Nevertheless, this house is bound in this case, as in all others, to judge (a) Ante, Vol UI.. 982. (b) Vol. II. 354.

ATTORNEY-GENERAL

v.
Hope
and Others.

ATTORNEY-GENERAL

HOPE
and Others.



for yourselves in the sai and if on serious con mind to think that ther will be my duty to repre fore take time to consid been urged, to examine and to make every faqui at the head of the eccle ters which have been b ment here, but which touched upon in the cou mode of stating it is whether in respect of of that amount, a prol granted in respect of all probate duty is elearly p the subject of probate is not payable. The this is the right way attempts to limit that by general question open bate was allowed to be porty in question. He in which I do not go ak a great deal of his argu locality and the shifting general. He says, loo will see the demurrer co that by the information the force of the demurre that it was in respect o effect of it, that possess obtained by the party; that the probate was gra fund. My lords, I do view of the case. It ma the probate was granted

tels locally situate within the bounds of the English ecclesiastical jurisdiction, and in respect of nothing else, but that that probate so granted here, and to that limited extent, may have been used elsewhere for another purpose, and with respect to other property out of the ecclesiastical jurisdiction; and that by means of making use elsewhere of a probate granted alio intuitu by the ecclesiastical court, the possession of the effects there situate may have been obtained, though the probate was not granted in respect of that foreign property. But assuming the fact of a probate being used for one purpose abroad, though it was granted for another at home, it does not by any means follow that the person possessing the probate, having used it for the purpose of getting in a foreign estate, and being enabled by that means to get it in, must be said to have obtained it for the sake of getting in that foreign estate, and is not decisive at all of the question. shall only throw it out to disembarrass the case of that argument. I was very much impressed with the argument as to the nature of the probate granted by the ecclesiastical court, and the ground for granting it, as connected with the jurisdiction of that court. could be satisfied that at any time the ecclesiastical court has so far forth taken into its view goods or personal estate of a testator or an intestate locally situate beyond its jurisdiction, and that before or after the period of its having granted probate, or when it was administered in pios usus pro salute animæ, it could be shown that they had drawn over to the same uses property situate out of their own jurisdiction, or that having possessed themselves of that which was within their grasp at the time of the death of the party, they had afterwards extended their hand abroad so as to get possession of that which, at the time of the death, was not within their jurisdiction, and had taken that for them-

ATTORNEY-GENERAL v. Hope and Others. ATTORNEYGENERAL
TA
HOPE
and Others,

selves, that would go a very great way in support of t Attorney General's argument, and would be near conclusive, as it would almost entirely displace the i genious arguments for the respondents. This is just matter not merely of antiquarian curiosity but beari most materially upon the case. I shall take care ascertain the opinion of the learned judges of the ecc slastical courts upon the extent of ecclesiastical juri diction in former times. If I shall find that it did a exist over property beyond the limits of the cour jurisdiction, there will arise another difficulty which thrown out by the Attorney General, viz. what becan of the assets if the ordinary did not get then they were not bona nullius or bona vacantia, and such belonging to the crown. There must be son administration, some mode of dealing with it; and that is not of a local nature, or limited by the extent the diocesan's jurisdiction, who originally assumed administer, and subsequently has granted probate the executor confirming the appointment of the d ceased, or letters of administration to an individual a pointed to discharge the duty in relation to that pr perty; the difficulty is to see by what rule it is to be d termined.

My lords, these are the points I wish to look intand I shall do so carefully, because though the case depends much upon them, they do not appear to have exercised the ingenuity or learning of the couns below in The Attorney General v. Dimond, or to have formed any ingredient in that decision, though delivered by the lord chief baron, as head of the comfatter time taken for consideration. Whether it we reduced into writing before it was pronounced is quit immaterial. Mr. Baron Bayley threw out in the coun of the arguments various interlocutory remarks, som of which are valuable. I have looked at them with

reference to the judgment of the court, and I think I can trace the substance of them in it.

before I move your lordships to proceed to judgment, whether probate is to be considered as limited or unlimited, as restricted to the personal estate of the testator in the diocese at the time of his death or otherwise. The case may very probably, if not altogether, depend, on at all events turn very materially upon the inquiry which I have stated I shall deem it proper to make, I mean as to what was formerly the extent of the jurisdiction of the ecclesiastical court, and the mode in which it dealt with assets situated in a foreign country at the time of the individual's decease. Upon these grounds, therefore, I shall move that the further consideration of this question be postponed.

Further consideration postponed.

On the 12th August 1834,

The Lord Chancellor said,—This was an appeal from the unanimous judgment of the court of Exchequer, upon an information filed by his majesty's Attorney-General, for the purpose of obtaining payment of probate duty in respect of assets of the testator, which at the time of his decease were situate without the jurisdiction of the court. When the case was argued, I entered at some length into the subject, and the reasons adduced on both sides, and stated that I could not agree with the argument urged by the Attorney-General in his reply, and that I did not think that the use that had been made of the probate, was a test of itself sufficient to demonstrate the purpose for which the probate had been granted. The words of the act refer not to the use eventually made of the probate, but distinctly

Antonney-General v. Hope and Others.



to the purpose for whi appears, what was in th of granting the probate, court granting it. The be the rule upon the pro appear to me to show,

appear to me to show, funds, that it is to be any eventually de facto mai or not, this case of for schedule, by reference t granted, or to which it v

It appeared to me, the

course of practice of the of probate, and whether extensive with the estate will was brought for pro the property, or in any reach, then it might be to the property where: relation to the property, of it, and that the duty other hand, it should be was merely granted in re time of the death in th cadet questio, for by pari contrary side, this is not words of the schedule o quently no probate duty

Now, it was, I think, jobate is granted by the or respect of the ancient potimes, from the interest was personalty of individuals for the safety of the soul is, probably, the origin of

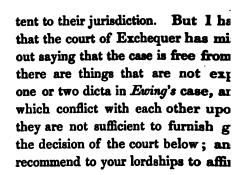
the clergy a great interest in personalty; the pious uses they applied them to is needless to inquire into. But from that arose what the present case depends on, that is, the necessity of a probate relinquishing the ordinary's right to the property, and vesting it in the administrator or executor by granting probate with the will annexed, or granting administration, if there was no will, and conferring that authority on another, from whence arose in later times the claim of the ordipary to vest the claim in other parties.

Now, if the ordinary could only lay claim and never did lay claim to any thing beyond the goods of the party in his jurisdiction at the time of his death, if he never thought of calling for foreign funds and laying his claim to them for pious uses, because the death took place in his jurisdiction, it clearly appears by the force of the argument I have now used, that the probate would not be granted except in respect of those goods in his jurisdiction; and if so, the probate duty cannot attach, and there is a clear omission. I believe the statute meant that it should attach, but if the legislature has used language insufficient for the purpose, the payment cannot be enforced.

I have made inquiry of two very learned authorities, and have also referred to the king's advocate, and they explicitly corroborate my view of the confined and restricted jurisdiction, and of the nature of the ordinary's office, and the goods in respect of which the probate is to be granted.

That of itself would be a strong ground for my affirming the decision of the court below, but I will not conceal from the house another reason which operates very strongly on my mind. Unless it was quite clear there had been a miscarriage below (and I used the same argument in The Attorney General v. Jackson with

1834. Hope and Others.



Judgment affirm

1834.

[The following cases, which, from the difficulty of procaring papers at the exact time when they were required, were not reported in their proper places in Easter and Trinity terms, are now added to close the fourth volume, with an Index. To prevent mistakes, the date on which judgment was delivered in each case is added to it.]

Lawis against Grace Morris and Lloyd Roberts.

CASE. The declaration stated that the defendant Two writs of Morris, by judgment of the court of Exchequer, had ca. sa. were issued at one recovered 1501, debt, with 81. 4s. 6d. damages and costs time into Anagainst the plaintiff, and that she and the defendant Carnarvon-Roberts, as her attorney in that behalf, had wrongfully shire. The debtor was sued out of the said court two writs of ca. sa. which arrested in were running at, the same time, one a testatum ca. sa. Anglesea on 1st November, directed to the sheriff of Carnarvonshire, the other a and having similar writ directed to the sheriff of Anglesea, both costs to the returnable on 2d November 1832; which writs were sheriff, was disrespectively delivered to the said sheriffs respectively nextday hewas to be executed in due form of law, and were indorsed arrested in respectively with directions to levy 211. 4s. 6d., besides on the other costs, &c. It then stated that the sheriff of Anglesea ca. sa., and was detained on 1st November, after the delivery to him of the said in custody till writ, and before its return, arrested the plaintiff by his the 15th, when the debt and body, and had and detained him in custody in execution costs were

Carnarvonshire paid over to

attorney, several days after he had been acquainted with the previous facts. The debtor then sued the creditor and her attorney in case for malicious non-feazance, in not giving notice to the sheriff of Carnarvonshire that the writ issued into Anglesea had been executed or the judgment satisfied, and that the writ directed to him was not to be executed: Held, that in the absence of proof that before the second arrest any notice had reached the creditor or her attorney of the first arrest, or of the payment of the debt and costs, or that at any time before his discharge the plaintiff had applied to either for a countermand of his imprisonment, which had been thereupon maliciously withheld, he could not maintain the action.

Semble, the discharge by the sheriff of Anglesea without consent of the plaintiff was

Semble, also, that the second arrest might have been set aside on application to a judge.

VOL. IV.

909

and Another.

executed as aforesaid, for want of such instructions or information as aforesaid, the said sheriff of the said county of Carnarvon, under and by virtue of the said writ so to him directed as aforesaid, afterwards, and after the execution of the said writ so directed to the said sheriff of the said county of Anglesea as aforesaid, to wit, on &c., in the county of Carnarvon, to wit, in the county of Flint, took and arrested the said plaintiff by his body, by virtue of the said writ directed to him as aforesaid, and the indorsement thereon, and took and detained him in custody for a long space of time, to wit, for the space of twenty days then next following, and by reason of the premises the said plaintiff was wrongfully and maliciously so kept and detained in custody as aforesaid, and was prevented all that time from conducting his own affairs and business, and has been otherwise greatly injured and damnified. general issue.

At the trial before Gaselee J. at the summer assizes for Flintshire in 1833, it appeared that the defendant Morris having in Trinity term 1832 recovered judgment against the plaintiff for 58l, debt and costs, the other defendant, as her attorney, took out execution by issuing at the same time two writs of ca. sa., one into Carnarvonshire the other into Anglesea. The plaintiff being arrested at Beaumaris in Anglesea on 1st November 1832, paid the debt and costs to the under-sheriff, who thereupon let him go without consent of Morris, the plaintiff in that action. Next day the plaintiff was arrested on the other ca. sa. at Carnarvon, a few miles from Beaumaris, and was kept in custody there that day. The next morning a person from the office of the under-sheriff of Anglesea brought a letter to Carnarvon, directed to the defendant Roberts, stating that the plaintiff had been arrested in Anglesea and

release till he had the gent and cost plaintiff remained in custody till th when the defendant Roberts having sheriff that the debt and costs had I into his hands as attorney for the the plaintiff was discharged. The vonshire had received notice on the and costs had been paid. For the urged, first, that the plaintiff should the ground that payment to the shes the ca. sa. was not such satisfaction the action as authorized his disch plaintiff's privity or order, Stamf and Taylor v. Baker (c); and, see was no such evidence of that maliants which would alone sustain nature (d). The learned judge exp that the sheriff of Anglesea was not releasing the plaintiff; but after re whether the defendant Roberts ought the plaintiff on the 9th, left the qu them upon the facts. The jury for no malice, and gave a verdict for th ject to a motion to enter a verdict fi

⁽a) See per Buller and Heath Js., 1 B. & P. 3!

shilling damages, if the court should think either defendant liable at law, after the jury had negatived malice. A rule having been accordingly obtained to enter such verdict or for a new trial,

LEWIS

7.

MORRIS
and Another.

J. Jervis and J. H. Lloyd showed cause. discharge of the plaintiff by the sheriff of Anglesea before paying over the debt and costs to the defendant Morris in satisfaction of her claim in that action, so as to make it imperative on her to sign an authority to the sheriff for his discharge, was a voluntary escape; Sluckford v. Austen (a), Crozer v. Pilling and Moore (b). The mere issuing concurrent writs of execution, without acting on them both at the same time, is not illegal; Hodgkinson v. Walley (c), Miller v. Parnell(d). In Scheibel v. Fairbain and another (e) it was held; that case would not lie against a party sting out a caplas ad respondendum, if he neglect to countermand it after payment of the debt; at least, unless malice be averred. Now it is not proved or can it be inferred that at the time of the second arrest the defendants knew that the ca. sa. had been executed and the debt and costs paid the day before in the adjoining county, hor could they presume the plaintiff to be at large under circumstances amounting to voluntary escape. No proof appeared that malice was entertained by these defendants against the plaintiff, whereas' in Crozer v. Pilling such circumstances appeared. Then the simple question was that which was settled in the negative by Slackford v. Austen, viz. whether the sheriff of Anglesea was an agent of the plaintiff for receiving the money sought to be reco-

⁽a) 14 East, 468. (b) 4 B. & Cr. 26. (c) Ante, Vol. II. 174.

⁽d) 6 Taunt. 370. 2 Marsh, 78, S. C. Sec 9 Pri. 5.

⁽e) 1 B. & P. 388.

Lewis
v.
Morris
aud Another.

vered on the ca. sa.?

"to keep the plaintiff' it at a certain day at V tiff of his damages," ur plaintiff's authority for

R. V. Richards (Fol it may be usual in pract execution, no entry of judgment rolls. In M that mere abandonment a writ of fieri facias, w taking the defendant in the writ of fi. fa. was ret the ca. sa. by taking the cution of the other, it be so that it became functi driven to take out fresh return of the first. In Ho says, "There is no dou issue together and be co on either, no award of e But if one is executed, a before you can so enter Now if both are execute roll must be that both w same day, which would the roll in this case wo into Anglesea, as the f and then of another is plaintiff was secondly tention of the plaintiff wrongful, for the payme to the defendant Robi

⁽a) 6 Taunt. R. 370.

being wrongful, it must be presumed to have been malicious, in the absence of any circumstance to rebut the presumption of malice; see per Lord Tenterden and Littledale J. in Crozer v. Pilling (a). [Alderson B. The jury in that case found malice; a result nearly inevitable, as Pilling, after having obtained the fruits of his judgment, refused to give an order for his debtor's discharge. Here, as soon as the plaintiff's attorney (b) was satisfied, and as soon as the jury thought he ought to have been satisfied, the plaintiff was discharged. Parke B. There is another case in the Common Pleas, Gibson v. Chaters (c), and one in K. B., Page v. Wiple (d), confirming Scheibel v. Fairbain. It was the duty of the person in custody to satisfy the plaintiff that he had been previously arrested and had paid the debt.]

LEWIS

V.

MORRIS
and Another.

PARKE B. (e).—It appears that in this case two writs of capias ad satisfaciendum were issued at the same time against the plaintiff into Anglesea and Carnarvonshire, as by the practice may be done. The plaintiff being arrested on the 1st November by the sheriff of Anglesea, paid him the amount of the debt and costs, and was thereupon set at large by him. That, according to the cases cited at the trial, was a voluntary escape by the plaintiff, after which the sheriff of Anglesea could not have re-taken him (f); it however happened that the next day, after having passed into Carnarvonshire, he was again arrested on the second concurrent writ of ca. sa. It appeared that on the evening of that day, the 2d of November, some notice from the

⁽a) 4 B. & Cr. 32, 34.

⁽b) See per Cur. 4 B. & Cr. 28.

⁽c) 2 B. & P. 129.

⁽d) 3 East, 314.

⁽e) 1st May 1834. Lord Lyndhurst was sitting in equity.

⁽f) See Ravenscroft v. Eyles, 2 Wils. 295; Featherstonhaugh v. Atkinson, Barnes, 273, cited by Lord Kenyon in Atkinson v. Jameson, 5 T. R. 25. See Carter, 112. Willes, 459. 2 T. R. 172. Allanson v. Butler, Sid. 331. Bac. Ab. tit. Escape in civil cases (C).

Lewid

Nonis

and Another.

undersheriff will and charte the steber had been satisfied had reached the which of the their plaintiff's attorney Roberts, but houseth metice had been given before the second urrest took place of he quates here made defendants cannot be liable for the first arrest, or for that which took place on the second process, because it did not appear that notice had been previously given to the creditor or her attorney of the execution of the first: nor for the detention after notice, because the jury have negatived malice. The cases of Scheibel v. Fairbain (a), Gibson v. Chaters (b), and Page v. Wiple (c), have established that the plaintiff's neglect to countermand the execution of process even after payment of the debt to himself or his agent, does not make him liable to an action, unless it be proved that there was malice in so doing. case it necessarily became a question for the jury, whethen the defendants were actuated by malicipus mative or not. They found in the pegative, and I concur in their decision; for the discharge of the plaintiff took place as soon as the plaintiff's attorney was perfectly satisfied that the first process hed been effected in procuring the payment of debt and costs; and the payment to the sheriff of Angleses was not pryment in law to the plaintiff himself. Quathe lauth gritz of the tre cases in the Common Pleas, it is clear, that the action will not lie; Hodgkinson v. Walley (d), has however been cited to prove that a plaintiff cannot act on two concurrent writs of hi fa, and cares at the same time, or on one, after the other has been executed. could only be an anthority for an application to discharge the defendant out of custody, on his second But the present is a special action on the case, which cannot be supported unless the counter-

⁽a) 1 B. & P. 388. (b) 2 B. & P. 129. (c) 3 East, 314.

⁽d) Ante, Vol. II. 174.

month with quescond; arrest of the plaintifficor of his detention after it should be found to have been withheld by the defendants on malicious motives... The reverse, beging been found by the jury, this rule must bashischarged in a told all got a man a male of a long. and a treatment of a back place on the second process BOLLAND, ALDERSON, and GURNEY Bs. concurred. namely many an application or her at orner of the Rule discharged (a). posite, because the gravity congained malice. The (4) See a case where a plaintiff was held not to be passive, but liable as an actor for the act of his attorney's agent in signing judgment against a defendance library is agent in signing of B. & C. Sb. of the cherry of the and the execution of process were other provinger of the doby a himself or his agent, tone or stake ing had read thiom unless it be was do not be good and the line of the line -adw WALKER against Jones and Others.

1864 Monnis and Another.

TETINUE Second plea, that the plaintiff did not Indetinue, a deliver the said goods and chattels to the defend-498. 11 General demurrer A Secretary of the Control of the Colly Eord LYNDHURST C. B.—The plea is bad, for the general dedetainer. Not the bailment, is the matter material to be traversed." That appears from Gledstone v. Hewitt'(b). and from Kettle v. Bromsall (c), and Brook's Abridg-Michit, fits. Definite, pl. 50., and Charters de Terre, &c. 13. 22. there cited. HIM: THE RESERVE SERVED to .960 300 20 Plea struck out on payment of costs.

tiff did not deto the defendants, is bad on

"I Comin appeared in support of the plea, Mansel in support of the demutrer. 4 to the work of the con-

(c) Willes R. 118.

The World Control of the case

1834.

PRIESTLEY against WATSON.

An increased poor-rate having been ussessed on certain premises, an appeal against it was entered at the next sessions and but no notice in writing of that appeal was given to the overseers under 41 G. 3. (U. K.) c. 23. s. 2. Before the hearing of the appeal the overseers distrained for the increased rate; the amount was paid under protest, and possession of the distress relinquished. The rate was afterwards reduced by order of sessions, in consequence of a decision of the King's Bench. An action having been brought by the ratepayers against a person who was overseer at the time of

THIS was an action of assumpsit brought by the plai tiff as clerk to the undertakers of the Aire and Cala Navigation, who were authorized by their act of pa liament to sue in his name, for money had and receive by the defendant for the use of the said undertake and on an account stated. At the trial before the there respited, Hon. Mr. Justice Alderson at the Lent assizes for Yor shire in the year 1833, a verdict was found for t plaintiff for 1631. 3s. 31d., subject to the opinion this court on the following case.

On 15th August 1828, the overseers of the poor the township of Brotherton in the county of York, whom the defendant was one, duly made and publish a rate for the relief of the poor of the said township, which they rated the said undertakers at the sum 1501. in respect of property of the annual value of 200 Against this rate the said undertakers entered appeal at the October sessions 1828, which appeal w was thereupon respited till the following sessions of January 185 On the 15th of December 1828, after summons a refusal to pay, a distress was duly made by the sa defendant, who was one of the overseers of Brotherte on a vessel belonging to the said undertakers, for 150 being the amount of the said rate; and, to prevent sale, the sum of 163l. 3s. 31d., being the amount of t said rate, and of the expenses of the said distress, we paid to the defendant, being still overseer of the poi who was at the same time served with a written prote signed by the company's clerk, and expressed to be

the distress, to recover the surplus as for so much money had and received by h to their use: Held, that no notice of appeal having been given to the oversee pursuant to the statute, the action would not lie.

behalf of the undertakers of the Aire and Calder Navigation.

PRIESTLEY
v.
Watson.

"I do hereby tender you the sum of 150l. for which you have distrained the goods and chattels of the said undertakers, and also the sum of 13l. 3s. 3½d. for costs of distress, making together the sum of 163l. 3s. 3½d.; but I do on their behalf hereby protest against your right to recover the same by the illegal distress you have made; and I do hereby give you notice that an action will be brought for restitution and for damages. Dated 15th December 1828."

And the defendant on that occasion gave a receipt for the said sum of 163l. 3s. $3\frac{1}{2}d$., of which the following is a copy.

"Received the 15th December 1828, of the Aire and Calder Navigation (by payment of J. P. S.), the sum of 150l. claimed and distrained for by the township of Brotherton for poor-rates, upon the undertakers of the said navigation, together with 13l. 3s. 3½d. for costs attending the distraining the same.

At the January sessions 1829, the rate was confirmed by an order of sessions, subject to a case for the opinion of the court of King's Bench (a); and whilst the decision of this case was pending, viz. on 27th March 1829, another rate was made by the overseers

⁽a) See Rez v. Justices of St. Peter's Liberty, York, 4 B. & Adol. 342.

PRIESTLEY V. WATSON.

of the said township of Brotherston in which is charge was made on the said undertakers in rea the same property assessed at the same annual of) 2000/...\against...which ...rate bthe ...and... under appealed to the then, next sessions, which appe respited; ... but before, the following sessions: Trinity term 1829 the court of King's Bench (b that the price of sessions confirming the rate 15th, August 1828, should be greated and th rate amended by an order of which the following akers were rated upon property assessed attack. value of 2010l. 2s. Sd.; and the said under continued to appeal against each of such lates and to aspect against each of such lates and to aspect aspectors. At the Junual session 18:00 rosp and to rate of lagues 17:8 was respited near against the rate of lagues 17:8 was respited from the rate of lagues 17:8 was respited peal against the rate of August 1718 was respited throat. Arno notice having been given to he Liberty of St. Peter's Yark | Uponhearing the sa Single of the King benefit of the British of the Br no pentalpharabid the records of the sections. The Undertakers of the part sessions, made, or Aire and Calder Navigation. Jappeal of the defen against a rate or assessment made for the relief poor of the township of Rrotherton in the west of the county of Nork, and within the liberty Peter's, York, be gumbhed for the insufficiency th and that the sessions do amend the said rate by st out therefrom the assessment made upon the defen in respect of that part of the river dire which within the said township of Brothestons And further ordered, that the defendants have lenve to a new notice of appeal against the said rates of a ment, and to apacify therein, if they think fit any ground of appeal against the said rate or assessme eding had respecting the said rate, but on the 10 Ato the Auty sassions (1889a) that appeal agains included a

rater of the Stehn of Monda 1820 was heat dienal this intowns amended by intrducing the assessment sattle Hise suff Popping of the tetable tetable of the sail andbreakers in the said township from 20001. to 20101. 28. Billy and an order of sessions was made accordingly; subject to a second case for the opinion of the court of King's Bench! The everseers of the poor of the said sownship however considered, until the determination of the court of King's Bench on such second case, to make rates for the relief of the poor, in all of which the said undertakers were rated upon property assessed at the annual value of 2010l. 2s. 8d.; and the said, undertakers continued to appeal against each of such rates to the quarter sessions. At the January sessions 1830, the appeal against the rate of August 1828 was respited to the next sessions, no notice having been given to the sessions of the order of the King's Bench of Trinity term 1829 hereinbefore mentioned. No further notice of that appeal appears in the records of the sessions, any other respite thereof during 1830, 1831, nor wittil the Easter sessions 1832. At Easter sessions 1632, the rate of the 15th August 1828, and all the miliequent rates, were amended by reducing the annual value of the rateable property of the said undertakers in the said township to 151. 16s. Upon such reductions www.umount of all the before-mentioned rates, payable by the said undertakers to the overseers of Brotherton, 124 Os. 6di only. The said undertakers made no application at the July sessions 1832 for any order directing the overseers of the township of Brotherton to refund to the said undertakers the sum of money so paid to the said defendant as aforesaid, deducting the said sum of 121.0s. 6d., nor was any entry made, nor any proceeding had respecting the said rate; but on the 12th October 1832, the following notice was served on the defendant.

Philippie

CASES IN LASTER

"To the Churchwartless

1834.

PRIESTLEY
v.
WATSON.

... the township of Broth of York, in the West and every of them, and and Walker Smith and " "As the solicitor and ! undertakers of the navi Culder in the west ridi hereby demand of would undertakers the sum of by the said undertakers, the 15th day of Devember certain rate or assessmen August 1828, for and to the poor of the said town assessed upon the said a cupiers of a cut or canal Aire within the township and weirs, and tolks, d charges, and expenses o warrant of distress for t or about the 23d day No and seals of Henry Jol Richardson Currer, clerk of the peace in and for th thereout such sum and at the said undertakers for and assessed upon them the said township of Bro amended and reduced b in and for the said liber and direction of his maje that behalf; and also take refuse or neglect to pay Joseph Priestley, at the o

Wakefield, within six days from the service hereof, an application will be made to the next general quarter sessions of the peace to be holden for and in the said liberty on the 20th day of October instant, as soon as counsel can be heard, for an order of the said court to be made upon you, the churchwardens and overseers of the poor of the said township of Brotherton, to repay and return to the said undertakers all such sum and sums of money as they ought not to have paid or been changed with; and also to pay to the said undertakers, or their said agent, all costs, charges, and expenses occasioned by their having paid, and having been required to pay the said sum of money so wrongfully charged upon them as aforesaid, in respect of the said rate or assessment above-mentioned. Dated 11th October 1832. Samuel Hailstone."

1 . . .

PRIESTLEY
v.
WATSON.

The said undertakers accordingly made an application at the following October sessions 1852, for an order directing the overseers of the said township of Brotherson to refund to the said undertakers the said sum of money so paid to the said defendant as aforesaid, deducting therefrom such sum as was due according to the said amended rates; which application was refused by the justices at the said sessions. In the years 1826 and 1827, and from thence to the time of the distress, between two and three pounds, but never more than ave pounds a year, had been collected for poor rates from the said undertakers by the overseers of Brothertan, but no rate books were produced at the trial previous to Aug. 1828. The defendant Watson was one of she overseers of the poor of Brotherton for the years 1828, 1829, 1830, 1831, and 1832 respectively, but with different coadjutors in each of these years. The township of Brotherton, long before and since August 1828, adopted the provisions and complied with the requi-

of his receipt of the money, and we the action brought. The money priated by the guardian to the firelief of the poor of the township pended before 12th October 1832 the opinion of the court is, wheth circumstances the plaintiff is entisaid sum of 1631. 3s. 3½d. or a thereof.

Wightman for the plaintiff.

The

Aire navigation, after deducting 121.
of all the amended and reduced rat
recover the whole amount for whi
entered, as a payment made under c
since determined to be illegal. By
c. 23. s. 2. the sum at which any pe
a poor-rate may be levied and reco
notwithstanding the person assessed
notice of appeal against such rate for
ever, provided that if any person asses
rate shall give the churchwardens
notice of appeal mentioned in the ac
giving such notice, and till the app
and determined, "no proceedings sh

PRIESTLAT

v.

WATSOM!

1884_j

prevent injury to the poor in the interval during which an appeal against a rate is pending, overseers are pro re nata enabled to levy the amount of the assessment appealed against, provided it does not exceed the previous rate. But, if that, rate be ordered by the King's Bench to be amended by reducing it, the parish efficers, must be bound to refund the surplus to the rate payer., It is immaterial what the amount of the last effective rate was, for the enactment cited only applies to the intermediate time during which the rate is subjudice at l' C.B. Why not apply to the right, quarter sessions pointed out by sect. 8 of 41 Geo. 3. (U.K.) a 23 to have the money returned? Upon that section the court of King's Bench has held, that, the application for an order to refund must be made to the same sessions which heard the appeal, or at least to that sessions which ordered the rate to be lowered. The case states that on the day when the sum now sought to be recovered was received, the defendant paid it over to the guardian of the poor, and that it was applied to the purposes of the poor rate before 12th Qet, 1832. The particular mode pointed out by the statute to obtain the return of the surplus payment made at the proper time, and from the proper individual, has not been pursued. Alderson B. The court of King's Bench had no authority to reduce the rate. It must be taken that they sent it back to the sessions with a recommendation to amend it by reducing it (a). It was a capital error to suffer more than the last effective rate to be distrained for without appealing from the distress (b). Parke B. The money was taken from

⁽a) See 4 B. C. Adol. 343. The first about the analysis of the

⁽⁶⁾ See 17 Gior S. c. Sd. 14. 71 and 41 Gior S. (U1 K.) c. 43. 18. 180 on plaint the iberiff smoot have supleyed the goods; Sebourin on Marshell and others, 3. B. 6. Adol. 40A.

PRIESTLEY

WATSON,

the plaintiff by a seizure of goods by this defendant, which was lawful at the time, and was paid over to the guardian of the poor in a manner which, before the reduction of the rate, was perfectly legal. The giving notice to the defendant to hold the money on account of the plaintiff does not prevent the law from operating. The guardian of the poor to whom the money was paid by the defendant had no right to retain it. Then at what moment did this sum constitute so much money had and received by this defendant to the use of the plaintiff?]

An appeal against the rate was made in time but quashed, and the rate was confirmed by the sessions (a). If the sessions had made an order to refund under sect. 8. it must have been directed to the overseers of the poor, of whom the defendant has always been one, and not to the guardian. It was sufficient for the plaintiff to show that more than 2L a year had never been paid, in order to throw it on the defendant to show that he had not levied more in amount that the last effective rate. Feltham v. Terry (b) and Wathins v. Hewlett (c) prove that money had and received will lie against overseers of the poor to recover money in their hands which was levied on a conviction since quashed, or the surplus of a sum paid to them for the future support of a bastard child which has since died-

Per Curiam (30th April).—It does not appear that the defendant had any such notice that the navigation company had appealed against the rate, as is required by sect. 2 of the act. Then unless the overseers were by law obliged to be satisfied with less, which would have been the case had such a notice been proved, the

⁽a) See Rex v. Undertakers of Aire and Calder Navigation, 4 B. & Ct. 820.

⁽b) E. 13 Geo. 3. (B. R.) cited Cowp. 419. and 1 T. R. 387.

⁽c) 1 Br. & B. 1. See 2 M. & R, 11.

overseers were entitled to levy the whole amount of the assessment of August 28th, and were then compelled by Gilbert's act, 22 Geo. 3. c. 83. ss. 7 & 8 (a), to pay it over to the guardians of the poor. The appeal might have been entered with or without the notice thereof to the overseers provided by the act; then this court is not to be left to conjecture that such notice was given (b). This defendant not being therefore shown to be a wrong-doer the action must fail.

PRIESTLEY
v.
WATSON.

Judgment for the defendant.

Bliss was to have argued for the defendant (c).

(a) Sec 41 Geo. 5. c. 9. x. 2.

Sales Agricia

(5) The report in 4 Bar. & Adol. 342. states, that the appeal against the rate was entered at the October semious 1828, and respited to the January sessions 1829, but that the overseers of Brotherton had no notice in writing of the entry and respite.

(c) The points set down for defendant were—First, The money was paid to limb as overseer of the township of Brotherton, and by him immediately paid over to the guardian of the poor of that township, pursuant to stat. 22 Geo. 3. c. 83. ss. 7 & 8. Secondly, that it did not appear that the distress in the case was illegal. (See stat. 41 Geo. 3. c. 23. ss. 1.2. 3. 4. and 8.) Thirdly, that the plaintiff had neither proved a demand of the perusal; and copy of the warrant of distress, nor that the action was commenced within six months after the act committed, pursuant to the stat. 24 Geo. 2. c. 44. ss. 6 and 8.

1834.

In two actions,

and award.

DIRBEN against M MARQUESS Of ANGI SAME against PEY:

THE first of these a

It was moved, first, to set asi

with certainty disposed of all the matters ref the plaintiff on all the issues joined in one of joined on the plea of not guilty: and, thirdly rected by the arbitrator on the facts state Held, first, that the award was final, and sul tween the parties: secondly, that as the arbitr ing of the reference to decide on each iss which justified under title in H., who had no was not bound to find any thing respecting might make up the roll, as if the causes had

10 1 Mills 10

one on the ance of various righ case for dis-Hanley common and w turbance of common, by inclosing a part, and the other in trespass taken generally for the plaintiff, subject to of those causes, and of another action of tre all antecedent causes of action between the p the defendants had justified in some of these p cause, was to be at liberty to become a parperson claiming right of common over the h ence being declared to be that the rights of I secured, and regulated as concerned the part not guilty was pleaded, and a great number of rights of common. In the other, not guilty, cation had been pleaded, though no issues The arbitrator awarded for the plai common. In the action of trespass which we ants were not guilty of the trespasses; and awarded that the plaintiff had no cause of a not further notice the other issues, or specify but proceeded, in pursuance of the terms of award the rights of the parties in the causes tain woods in future. He then directed the I action, and plaintiff in the two others, to pa

charged from trying the special issues.

The arbitrator stated the following facts fo verdict to be entered according to the decisio over which common was claimed, had been bourne Chase. In 17 Eliz. the lord being own manor, granted several leases for a thousar common of pasture as appurtenant thereto, for in the manner then accustomed by others mon then accustomed was from 12th Mar of the woods wherein the owner from time i wood at his pleasure, and which he was acc serve the young growth, excluding the de

In the third count common of pasture was claimed on Hanley common for two rother beasts levant &c. every year and at all times of the year, as appurtenant to plaintiff's messuage and land in Hanley. The fourth count claimed like common for one rother beast and two sheep. The ninth claimed like common in Hanley woods for one rother beast. The tenth claimed like common there from 12th May to 22d November every year. The fifteenth claimed common of pasture for one rother beast in Woodcott common. The second and last actions were in trespass for breaking and entering certain coppices of the Marquess of Anglesea, and breaking fences, whereby cattle got in and damaged the trees. In the first action the plea was not guilty. In the other two the general issue was pleaded (before the new rules), with a great number of special pleas of fustification, claiming several rights of common and pannage over the places in question, called Hanley commons and woods. Issues having been joined by the plaintiff, the three causes, and "all antecedent causes of action between the marquess and the said other parties or any of them," were afterwards referred to a serjeant at law by order of nisi prius, a verdict being first entered for the plaintiff in the two first actions, subject to his direction whether they should stand, and if so, for what damages; or whether a ver-

DIBBEN
v.
Marquess of
ANGLESEA.

all commonable cattle for four years, after each cutting. This right was enjoyed by the grantees till the disturbance complained of. The question was, whether the owner of the woods could legally inclose any part of them where the wood had been cut down, so as to keep out all commonable cattle for seven years after each cutting? Held that he could not, on two grounds: first, that stat. 22 Ed. 4. c. 7. does not apply to woods wherein rights of common exist; and secondly, that 35 Hen. 8. c. 17. s. 8. only extends to woods in which there exists immemorial right of common, in which case it provides means by which the space where wood is intended to be cut may be inclosed and kept in severalty for seven years.

Where by an order of reference the costs of the causes referred were to abide the event of them, and in one, which was not at asuc, the arbitrator found that the plaintiff had no cause of action against the defendants:—Held, that the costs of the

pleadings followed the event of the cause, as in case of a nonsuit.



DIBBEN
v.
Marquest of
ANGLESEA.

dict should be found fo The third e entered. pleas. The erbitrator to be the 12th May, ar be intended by Old M ordered that the arbitr of common, and all ot reference, in relation to pleadings in the causes them such rights, or an that the costs of the and of so much of the said causes, should abi respectively, and the re ence, and also the costs in the discretion of the and by whom and in wl paid. J. Hardiman at claiming to have, rights on the commons or woo were to be at liberty to but such parties, or any subject or liable to the them, the parties to th award to be made und basis of an act of parli regulating the enjoymen Lill and Peyton not t pense relating to such a being declared to be th and the extent of the cor cured, and regulated as and therefore it was agre the statement of the nui which the rights set

claimed, or other technic

which could prevent a decision of the causes on the merits, should be taken or allowed. Power was then given to the arbitrator to amend the pleadings, and to beate special facts for the opinion of the court, at the request of either party, or at the like request to set that on the award any question of law which might price.

DIBBEN
v.
Marquess of Anolesea.

in Dibben v. The Marquess of Anglesea he awarded that the plaintiff had just cause of action for the matters in the third, fourth, ninth, tenth, and fifteenth counts, and assessed the damages therein at 151.; directing a verdict for plaintiff "accordingly," and for the defendant on the other counts. In the Marquess of Anglesea v. Dibben and Lill he awarded that the defendants were not guilty of the trespasses mentioned in the declaration, and ordered a verdict to be entered for them accordingly. In Marquess of Anglesea v. Poyton and others, he awarded that the plaintiff had no tame of action against the defendants for the matters in the declaration in that cause mentioned. no notice of the other issues in either cause, nor did he further specify any mode for terminating either of them; but proceeded to award that the Marquess of Anglesea was seised of and entitled to the manor of Hanley, in the county of Dorset; and was also seised of and entitled to the soil and freehold of and in the said several coppices in the declaration in the said cause of the said marquess against Dibben and Lill mentioned; and also of and in certain other coppices, situate in the said manor and parish of Hanley, and named in the award; and in two coppices called B., being part of the coppices or woods situate in the said manor of Hanley, called Hanley Woods, and in the said parish of Hanley, and referred to in the said action of Dibben v. Marquess of Anglesea; and also of and in the said commons in the declaration in that cause mentioned,



CASES IN EASTER

situate in the manor a



Anglesea.

Hanley and Woodcott's awarded and adjudged t others who may be the o woods or coppices might pleasure, from time to t part thereof, and might so cut down, and exch beasts, commonable or space of four successive preservation of the grow thereon. The arbitrato and all those &c. had if upon, and throughout H for six rother beasts and calves, and sixty-three si and also common of par woods every year for the ners, except when the se be cut or inclosed, as a from 12th May to 22d A He then awarded that the said commons and public ways; and that I other right therein, exce of way. He further a those whose estate he i messuage, land, and pre Hanley &c., containing pasture in, upon, and th cott commons for all hi pigs being ringed, levani the said coppices and year, except when the s be cut and inclosed, as

12th May to 22d Noven

DIBBEN

D. Marquess of Anolesea.

aleb to take reasonable estoyers of the furze and fern growing on the said commons, and carry the same to the said messuage with the appurtenances to be spent herein and consumed for necessary fuel thereon every year, at all reasonable times of the year, at his free will and pleasure, as appurtenant to his messuage; and that Peyton was entitled to no other right in the said woods or commons, except the use of the public ways therein. After providing power for the marquess and owners &c. of the coppices to amend and renew the bank and fence there lately made round the same, and that the commons named shall extend up to that fence Antherever they shall adjoin it), and no further, he awarded, that the marquess do and shall leave open on each side of each coppice or wood which shall be so inclosed, except as hereinbefore mentioned, in respect of the coppices or woods inclosed after the same shall have been cut, at least two unobstructed ways, at convemient distances, for ingress and egress to and from the same, to be left open from 23d November to the 11th May (both days inclusive) in each year.

The arbitrator then stated the following facts:—The parish and manor of Hanley, and all the messuages, lands, and tenements before mentioned, were, from time whereof the memory of man is not to the contrary, within Cranbourne Chase, and so continued until the said chase, by an act of parliament passed in 9 G. 4. (a), in manner and for the considerations therein mentioned, and the award which was duly made and published in pursuance of the said act of parliament, was disfranchised, and which said act of parliament and award were produced in evidence before me, and to which I do award that the court may be referred; and further, that in the 17th year of the reign of Queen

⁽a) 9 G. 4. c 14. private act.

Elizabeth, the Right Hon: Sir John Punder la

DIBBEN v.

1R84.

b.

Marquese of
Anoleses.

Barl of Willshire and Marquest of Wilshire, then h of the manor of Honley, and owner of the said coppl and woods, and whose cetate therein the said Marge of Anglesea now hath, made and granted several less of the same respective messuages, lands, and to ments, now held and occupied by the said M. Dib and J. S. Peyton respectively, for the term of H years respectively thence next ensuing; and in each the said leases were granted and demised common pasture, as appurtenant to the said premises, messuig and lands respectively, for certain rother beasts. over, and upon the said woods and coppices, to be us and enjoyed in the manner then accustomed by oth having common of pasture in, over, and upon the ear woods and coppices for the fike commonable catt And further, that the said persons were then acc tomed to have and enjoy common of pasture for t like commonable cattle, in, upon, and over the se woods and copplices every year, in and upon the si 12th day of May, and from thence until the 29d day November then next following, except only such par of the said woods wherein the owner or occupier there from time to time, at his free will and pleasure, c down the said wood and underwood there growing which part or parts thereof so cut down, the said own or occupier was accustomed to inclose with a feace preserve the growth of the wood and underwood therei and thereby excluded all beasts and cattle therefron until the end of three successive years from the time

such cutting as aforesaid, when the deer of the sa chase were admitted into such coppices and wood and all other cattle and beasts were excluded then from, until the end of four successive years from th time of such cutting as aforesaid, when the said con monable cattle were admitted at the same time and fo

the same periods as before the said coppices and woods evere cut as aforesaid. And further, that from the time of such leases being so granted hitherto, the said lessees and assignees, their farmers, tenants, and occupiers of the said premises respectively, have used and enjoyed the said common of pasture in the said woods and coppices in like manner. And in case any of the superior courts of law at Westminster, wherein the said question of law shall be hereupon raised, shall decide that upon the said facts and evidence hereinbefore stated, that the said marquess is entitled to inclose the said coppices and woods so from time to time to be cut down as aforesaid, and exclude therefrom all the said cattle and beasts for the space of seven successive years, then I award &c. that the said marquess; and all others who shall be owners or occupiers of the said woods and coppices, may, at his and their free will and pleasure, from time to time, when the same or any part thereof shall be so cut down by him or them as aforesaid, inclose the same or such part thereof, for the space of seven successive years, for the preservation of the said wood and underwood; and may during the seven years exclude all manner of beasts and cattle therefrom, instead of for the space of four years hereinbefore mentioned. And in case the said court shall decide that upon the said facts and evidence the said marquess is entitled to inclose the said coppices or woods so from time to time to be cut down as aforesaid, in case the said woods and coppices should be nunder the age of fourteen years at the time of their theing so cut down as aforesaid, and exclude all cattle and beasts for the term of five years, and all cattle except calves and yearling colts for the term of six years; and if the said woods or coppices shall be above the age of fourteen years at the time of such cutting, then to inclose the same and exclude all cattle and

DIBBEN

DIBBEN

Marquess of
Anglesea.

DIBBEN
v.
Marquess of
Anglesea.

beasts therefrom for the term of eight years: then, and in that case, I do award, order, direct, and determine that the said marquess and all others the owners and occupiers of the said woods and coppices, may at his free will and pleasure, inclose such and such parts of the said woods and coppices so from time to time to be cut down as aforesaid, and exclude al beasts and cattle therefrom, if the same shall be unde the age of fourteen years at the time of such cutting for the space of five years; and all beasts and cattle except calves and yearling colts for the space of si years; and if such or such parts of the said woods and coppices so to be cut down as aforesaid be above th age of fourteen years, then that he the said Marques of Anglesea, and all others the owners and occupier thereof, may, at his and their free will and pleasure inclose the same so cut down as aforesaid, and exclud all beasts and cattle therefrom for the space of eigh years; and in case the said court shall decide that the said marquess is entitled to inclose such or such part of the said woods or coppices from time to time ci down as aforesaid, for a longer space of time that five years after such respective cutting, and that th said plaintiff, in the said action brought by the sai Henry Dibben against the said marquess, is therefor not entitled to a verdict upon the ninth and tent counts of the declaration in the said last-mentions action: then I do award &c. that a verdict be en tered for the defendant instead of the said plainti upon the ninth and tenth counts of the said declar tion, as bereinbefore mentioned. And I do awar that the damages of the said plaintiff in the said las mentioned action do amount to the sum of one shilling and that the verdict be entered accordingly. I do further award that the said marquess do an shall pay and bear the costs of the special juries i

the said causes, and all costs of and attending this reference and award not relating to the said causes. In Michaelman term 1883, Barstow for the Marquess of Anglesea moved to set aside the award, on the ground that it was not final, not having disposed of the matters referred in Marquess of Anglesea v. Dibben and another, or in Same v. Peyton and others. Secondly, if it was beld final, he then moved to enter all those issues for the marquess in the first and second actions, which were not noticed by the arbitrator. Thirdly, he objected that no judgment could be entered on the roll, as the instructor had not ordered any entry to be made of a discharge of the jury as to the issues on the special pleas. He did not however admit that the arbitrator had power to order such an entry to be made.

"The affidavit in support of the motion stated, that in many of the pleas in the said actions in which the imerquess was plaintiff, the defendants justified the alleged trespasses under the authority of J. Hardiman, who was alleged to be entitled to various rights of common over the coppices and commons mentioned In the declarations; and that on the sixth day of the reference, the counsel for the defendants in those two actions, produced as evidence of such rights, certain indentures of lease and release, dated 24th and 25th September 1700, which were alleged to have been found among the deeds of the said J. Hardiman: but did not otherwise in any way attempt to prove that the premises or the rights of common conveyed by the said indentures had become vested in the said J. Hardiman. That, with this exception, the case of 'the defendants in those actions was closed without -giving any other title-deeds in evidence, in the hope, the said defendant believed, that the parol evidence

given of right of common of pasture would be deemed



Dresen v. Marquess of Anguess of

sufficient by the arbitrator to establish a claim common of pasture for all their commonable catt levant et couchant on their respective messuages; ar that, in consequence, the case and evidence on the part of the marquess were next wholly gone throug on the supposition and understanding that the rig set up by the said defendants was intended to re entirely on levancy and couchancy, and that no mo deeds were to be given in evidence; that it was n until the ninth day of reference, when the marques case and evidence were closed, that the counsel f the defendants produced another deed belonging Dibben, by which certain rights of common for a limit number of cattle and sheep were conveyed; and the all three defendants then entered into further par testimony, at the conclusion of which their couns offered to produce, and in consequence of the observ tions of the arbitrator, did produce various title deed and documents of Dibben and Lill, by which certain limited rights of common were granted, which wer alleged to have become vested in them respectively and also produced other papers called evidences of titl of Peyton, the production and proof of which deed and papers occupied the greater part of the next da being the tenth of the reference: that the fact of th trespasses which are the subject of the said actions i which the said Marquess of Anglesea was plainti having been committed by the said Dibben was abunc antly proved in evidence, and was admitted by h counsel in his reply; but that many witnesses wer called for the exclusive purpose of endeavouring t prove that Peyton and Lill had not participated i them so as to render them jointly liable with the sai Dibben: that an extract of the award made by P. W the commissioner appointed under the act for dis

franchising Cranbourne Chase (9 Geo. 4, c. 14. Pr.) on the 29th September 1829, was given in evidence before the said arbitrator, whereby, after reciting that George Lord Rivers had died after the passing of the said act. and had given or devised the annual rents or sums of money charged, as by the said act is directed, to be charged upon any lands lying within the limits of the said chase, together with all powers and remedies for recovering the same rents, and the full benefit and advantage thereof; and also all such lands as should or might be set out by way of satisfaction and compensation of such rent and rents unto certain persons therein named, and their heirs, to certain uses; and the said P. W. did award and direct that the several and respective annual rents or sums mentioned and specified or set forth in the schedule hereinafter set forth, amounting in the whole to the yearly sum of 1800l. should be for ever respectively issuing and payable to the said devisees, their heirs and assigns, or to the person or persons for the time being entitled to the said estate so devised by the said George Lord Rivers, from and out of such of the respective lands within the limits of the said chase, being respectively of adequate value, as were mentioned and specified in the schedule hereinafter set forth.

DIRREN

DIRREN

V.

Marquess of

Anglessea.

No.		Occupier.	Situation.	No. Map.	Premises.	Proportion of actual Rent Charge.	Rate per Acre at which the Lands are charged.
Map c. 19.	The Most Noble Henry William; Marquess of Anglesca.	Benjamin Biles.	Hendley.	1 2 3 4 &c. &c.	In this column are set forth the full particulars of Biles's Farm.	£. s. d. 139 3 0	£. s. d. 0 4 9

DIBBER
v.
Marquess of
ANGLESEA.

That for the purposes of the said reference, the si was admitted by the counsel for Peyton, Dibben, L and Hardiman, that neither of those parties we charged with any part of the said rent-charge of 180 Some letters from the defendant Dibben were then forth stating the committing of the trespasses by him

In the affidavit filed in answer to the rule, it stated that parol evidence was given before the s arbitrator, showing the exercise of rights of common the said J. Hardiman, and of those from which derived his title to the premises in respect of wh such rights were claimed in the pleadings in the s actions in which the said marquess was plaintiff; and t all the trespasses in the said action secondly ab mentioned, were alleged in the declaration in that act to have been committed in five named coppices spectively; and that it was clearly proved before said arbitrator, that the said five closes adjoined Hen common, and that there has always been a certain ! or border, varying in width from about fifteen to twe feet and upwards, extending nearly round the s common (a); and that it was proved by the witnes on behalf of the said Dibben and Lill, that the said ! or border formed no part of the said closes, or any them, but was part of Hanley common; and also the certain mound and fence, erected by the said marqu in the beginning of 1831, was erected, not on the s five closes or any of them, nor much of it, if any at on the said belt or border, but upon certain other pa of the said common, near to the said belt or bord and that it was stated by witnesses called on the n of the said marquess, that they considered the said ! or border as forming part of the said five closes spectively, and that the greater part of the said more and fence was erected upon the said belt or borde that the trespasses alleged in the declaration in t

⁽a) See Stanley v. White, 14 East, 332.

cause secondly above-mentioned were no otherwise proved and admitted than by proof and admission that the said Dibben had made gaps in the said mound and fence for the express and avowed purpose of asserting the rights of himself and of other persons claiming rights of common, the exercise of which was wholly obstructed and prevented by the said mound and fence, and which mound and fence had been erected for the avowed purpose of obstructing and preventing the exercise of such rights of common.

On the part of the marquess, it was contended before the arbitrator, that the belt or border above-mentioned formed part of the coppices which it adjoined; and on the other side it was contended, that this belt or border formed part of *Hanley* common, which it also adjoined, and much conflicting evidence was given upon the question.

The Court granted a rule to show cause why the award made in pursuance of the order of nisi prius should not be set aside, on the grounds that the same was not certain or final, and that it did not dispose of all the matters referred to the arbitrator; or why, in The Marquess of Anglesea v. Dibben and another, a verdict should not be entered for the plaintiff on all the issues except that arising out of the plea of "not guilty" to the declaration; and why, in Dibben v. Marquess of Anglesea, a verdict should not be entered for the defendant on the ninth and tenth counts of the declaration. and the verdict for the plaintiff entered on the third, fourth, and fifteenth counts only, and for nominal damages, and why the said verdicts should not be set The court also ordered the rule with the preceding affidavits to be put in the special paper for argument, and that in the meantime proceedings be staved. In this term

DIBBER

v.

Marquess of Anglessa.

DIBBEN
v.
Marquess of
ANGLEREA.

Barstow for the Marquess of Angleseq was co to state his reasons for setting aside the award award is not final or certain, for the arbitrator disposed of all the issues in the action against and Lill, or in that against them and Peyton. latter, the award that the plaintiff had no cause o may be either because the plaintiff did not prove ! passes laid, or because the defendant established one of the justifications. The defendants in bo actions, after alternately justifying on their own set up a fourth title in Hardiman (a), justifyin servants in several pleas to the new assignments also produced his documentary title before the art though be bad not become party to the referen suant to its terms, so as to be bound by it, Non order of nisi prips, the three causes were referre every antecedent matter in difference; and it w : important, for all, parties , that, avery, issue in eac should the disposed of, not only by ascertain rights of Dibben, Lill, and Payton; but also t Hardinan, so far as to estop the three defend their successors (from setting up his rights again owners of the woods, further than settled by the awarded in these causes. For Outrant w. Maren shows, that if a verdict had been found on the setting up Hardinan's title, it might be pleaded of estoppel in any other action between the same or their privies in respect of the same fact of whereas, as the award stands, Dibben, Lill or . may yet, under Hardiman, justify similar acts. the owners of the woods. On the other hand. I award been made on these issues, finding a r

⁽a) Hardiman was afterwards stated to be owner of other pr Hanley not belonging to Dibben, Lill, or Peyton.

⁽b) 3 East, 346.

Hardinan, he might have produced it in evidence against such owners; Hancock v. Welsh and Cooper(a). The importance of the decision of all the issues to the parties being shown, it is contended that they had a right to have them all decided, whether tried by a jury or an arbitrator.

DIBBEN v.
Marquess of Anglesea.

[Lord Lyndhurst C. B. Prima facie it seems that if these causes had been tried at nisi prius, and verdicts had been found for the defendants on the pleas of not guilty, that finding would have disposed of the special issues. It is now said that a jury would have been compellable to try each of them, and that the arbitrator who did not do the same, failed in his duty. In Cossey v. Diggons (b) there was an avowry for rent, to which the pleas in bar were non tenuit and riens in arrear. The first plea was found for the plaintiff, and it was held that the second became thereby immaterial, and that the proper course at nisi prius would have been to discharge the jury from finding any verdict on it. But as no verdict at all had been entered on the record, the court said they had at Wresent no jurisdiction, and suggested an application to the judge to direct in what manner it should be entered. (It was afterwards entered for the plaintiff.)

The general issue is unimportant while the special pleas raise questions of right, of each of which it was the sole object of the submission to procure a settlement. The fury are summoned to try every issue without distinction. Can a judge discharge a jury from trying any issue which is in his opinion rendered immaterial by the finding on any other issue? In Powell and others v. Sonnett and others (c), in error in the Ex-

⁽a) 1 Stark. C. N. P. 347; and see Kinnersley v. Orpe, Doug. 517.

⁽b) 2 B. & Ald. 546; see 5 T. R. 248, S. B. & P. 348.

⁽c) 3 Bing. 381, as to discharge of jury by operation of law from finding immaterial issue.

CASES IN EASTER

DIEBEN

1834.

Marquess of ANGLESEA.

chequer Chamber, the re tiffs on twelve counts, as eight others, without adsent of parties. The j affirmed notwithstanding ferring omnia rite esse a motion in arrest of jud record. That case how was a necessary requisite those circumstances. [Le was there only called on such objection appeared failure to make out a prin rize a judge to discharge defendants' instance, oth portance to them and tl suggested that Hardin from his not becoming might have been urged to ascertain it.

Lastly, how can the j the arbitrator has not ord of the jury as to the issue damages being ascertaine Norris v. Daniel (a) the award were to abide the arbitrators found that p action" on five out of eigh of the other three, and av pay 5l. damages, and that be had in the action. I no award as to three courize the officer to tax c award could stand. In

⁽a) 9 Bing. 507. See In re I. Hornby, 8 Bing. 13; and Eardley

defendants were entitled to judgment on some of the issues, but were precluded from obtaining their costs on them by the form of the award. Wykes v. Shipton and another (a) was an action of trespass, in which the general issue and a justification were pleaded. Replication, de injuriâ, with a new assignment. Judgment by default on the latter. The arbitrator to whom it was referred awarded a verdict for defendant, without giving damages on the new assignment. On objection that on that account the award was not final, and it being argued that till damages are found the court could not give judgment on the whole case, the award was set aside. Supposing the award is treated as valid, the verdict should be entered against Lill on all the issues.

On the special facts stated by the arbitrator for the opinion of the court, Barstow contended that in Dibben v. Marquess of Anglesea the verdict should be entered for the plaintiff on the third, fourth, and fifteenth counts only, and for the defendant upon the ninth and tenth counts of the declaration, with reduction of damages to one shilling, pursuant to the terms of the award. first, by stat. 22 Edw. 4. c. 7., the marquess was entitled, as owner of the woods in the chase, to keep out commonable cattle for seven years, whatever might be the period of the growth of the wood; and, secondly, by the statutes 35 Hen. 8. c. 16., and 14 Eliz. c. 25., he was entitled, as such owner, to keep out commonable cattle for the different times pointed out by those statutes, with reference to the growth of the wood; but for not less than seven years from the last cutting of the wood. The opinion at which the court will arrive on these points may govern the entry of the judgment on the issues in the cause of The Marquess of

⁽a) Cited from T. Peake's MSS., K. B. 21st January 1834; 12 L. J. 91.

1834.
DIBBEN
v.
Marquess of
Anglesea.

Anglesea v. Dibben and Lill. On the first point Edw. 4. c. 7. (A. D. 1482-3,) recites, "that divers jects, having woods growing on their own growithin forests and chases in England, or purlieus of same, have cut their said wood, because they might before time cope (a) or inclose their said groums save the young spring of their wood so cut, any lotime than for three years, the same young spring

been in times past, and daily is destroyed with be and cattle of the same forest, chases, and purlieu the great hindrance &c., and to the likely destruc of the same forests, chases, and purlieus." It enacts, "that if any subject, having wood of his growing on his own ground within any forest, ch &c., shall fell, by licence of the king or his heirs, ir forests, chases, or purlieus, or without licence in forest &c. of any other person, or make any sal the same wood; it shall be lawful to the same jects, owners of the same ground whereon the so felled did grow, and to other such persons to w such wood shall happen to be sold, immedia after the wood so felled, to cope and inclose same ground with sufficient hedges able to keep or manner of beasts and cattle forth of the same gro for the preserving of their young spring; and the hedges so made may keep continually for seven next after the same inclosing, and repair and su the same as often as shall need within the same s years." Next, 35 Hen. 8. c. 17. (b) enacted by section "that owners of woods or coppice set with great above 24 years growth, shall, at the felling or wee thereof, leave twelve of them per acre to be prese by them for twenty years next after the felling,

⁽a) Quere, meaning, embank? See Johnson's Dict. verb. Cop. Cop. and see Tyrwhitt and Tyndals's Digest of the Statutes, tits. Trees, W
(b) Made perpetual by 13 Elic. c. 25. s. 3.

defendants were entitled to judgment on some of the issues, but were precluded from obtaining their costs on them by the form of the award. Wyhes v. Shipton and another (a) was an action of trespass, in which the general issue and a justification were pleaded. Replication, de injuriâ, with a new assignment. Judgment by default on the latter. The arbitrator to whom it was referred awarded a verdict for defendant, without giving damages on the new assignment. On objection that on that account the award was not final, and it being argued that till damages are found the court could not give judgment on the whole case, the award was set aside. Supposing the award is treated as valid, the verdict should be entered against Lill on all the issues.

DIBBEN
v.
Marquess of
Anglesea.

On the special facts stated by the arbitrator for the opinion of the court, Barstow contended that in Dibben v. Marquess of Anglesea the verdict should be entered for the plaintiff on the third, fourth, and fifteenth counts only, and for the defendant upon the ninth and tenth counts of the declaration, with reduction of damages to one shilling, pursuant to the terms of the award. For, first, by stat. 22 Edw. 4. c. 7., the marquess was entitled, as owner of the woods in the chase, to keep out commonable cattle for seven years, whatever might be the period of the growth of the wood; and, secondly, by the statutes 35 Hen. 8. c. 16., and 14 Eliz. c. 25., he was entitled, as such owner, to keep out commonable cattle for the different times pointed out by those statutes, with reference to the growth of the wood; but for not less than seven years from the last cutting of the wood. The opinion at which the court will arrive on these points may govern the entry of the judgment on the issues in the cause of The Marquess of

⁽a) Cited from T. Peake's MSS., K. B. 21st January 1834; 12 L. J. 91.

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DIBBEN
v.
Marquess of
Anglesea.

of sale thereof till the end of five years, nor from end of five years, any other cattle, but calves and ling colts only, till the end of six years, if the wood under the age of fourteen years at the last fall, or eight years, if the wood was above the age of four years at the last fall, &c. Then the marquess was pelled by statute Hen. 8. to keep all commonable (out of the felled coppices for seven years after fall, for that exclusion was intended by the act the public object of preserving timber and woo suspending the rights of the commoners (a). therefore apply, though the subsequent grant of Marquess of Wiltshire to the predecessors of Di Peyton, &c., contained no words of exclusion. can 35 Hen. 8. c. 17. be called obsolete. By 29 G c. 36. s. 1., reciting that the general provisions c Hen. 8. had not been duly put in execution, owne woods wherein others have common of pasture with assent of the majority of commoners, inclos growth of timber or underwood any part of such we for such time and on such conditions as to recom: as shall be agreed. The subsequent acts, 31 Geo. 41., and 10 Geo. 3. c. 42. s. 7., regulate the recom: to be paid. The protection of the spot while it ret woodland is all that is here contended for. [Lyndhurst C. B. The act 35 Hen. 8. c. 17., which section 9 imposes certain restrictions on the cutting woods by the owners, confines those restrictions to of commons existing beyond man's remembrance, section 7. In so doing, the legislature might have I that in future grants to be made of commons, arri ments would be made to protect the rights of owners of woods.] The object of protecting w from cattle being the same, whether the right of pa claimed rested on grant or immemorial prescrip

1884.
DIBBEN

v. Marquess of Anglesea.

ought to prevail in either case. Many cases show that what is done against an express statutory provision made for the benefit of the public, cannot be the subject of an action (a). In Wetherell v. Jones (b) Lord Tenterden says, "Where a contract which a plaintiff seeks to enforce is expressly or by implication forbidden by the statute or common law, no court will lend its assistance to give it effect." As to 22 Edw. 4. c. 7., it was questioned in Barrington's case (c) whether a commoner was within the meaning of that act. According to Coke's report, it was held only to extend to owners of several woods, and not to commoners. But the report in Godbolt(d) shows, that though Lord Coke and Foster J. were of that opinion, Warburton J. held that statute 22 Edw. 4. did apply to woods in which were rights of common, while Walmsley J. rested his judgment on other grounds. The marquess has however a right to stand on 35 Hen. 8. and 13 Elix. [Parke B. As the statute 22 Edw. 4. only gave power to the marquess and his predecessors to inclose for their own benefit, they might renounce that right.]

Manning contrà. It is clear that the first cause is disposed of. The next objection is, that from the arbitrator's default in not ascertaining the rights of Hardiman, the three defendants in the two last causes may again as his servants commit the acts complained of; but the arbitrator has ascertained all the rights of the parties to the reference, they being the same as on the pleadings.

⁽a) See Bensley v. Bignold, 5 B. & Ald. 335; Langton v. Hughes, 1 M. & S. 593; Law v. Hodgson, 11 East, 300; Brown v. Duncan, 10 B. & Cr. 93; Little v. Poole, 9 B. & Cr. 192.

⁽b) 3 B. & Adol. 225.

⁽e) 8 °Co. Rep. 136. Chalk v. Peter, S. C. See Lord Coke's preface to the 8th part of his Reports, p. xxxi.

⁽d) Page 16?, nom. Chalk v. Peter. S. C. 2 Brownlow, 289.

DIBBEN
v.
Marquess of
Anglesea.

Hardiman's rights could in no way be adjudicate by the arbitrator, unless he had become party t reference according to the liberty left to him to a In Wykes v. Shipton, the issue on the new assign not being disposed of by assessing the damages, were no materials for a judgment of the court. here the arbitrator, by ascertaining and describin rights of common, has disposed of all the matt dispute dehors the causes; and the verdict for defendants, on not guilty pleaded, made any noti the other pleas immaterial; for that result v arise from the finding that the acts alleged as tresp were committed on open common. Suppose that action of trespass against Dibben and Lill had tried, and that the jury had found them not gui the trespasses alleged, it would have been absu ask them what their finding was on the righ common set up in the special pleas, on the assum that the acts of trespass were proved to have committed. The consent of the parties is not rea to the discharge of the jury. If on demurrer to a which is a bar to the action, the plea is held ! judgment of nil capiat is entered against the plai notwithstanding there are other issues in fact (a).

[Lord Lyndhurst C.B. If, under such circumsta as these, a judge could not discharge the jury trying the remaining issues, a party might try rights without any actual infringement of them he occurred. But that would not be suffered. The j ment in Cossey v. Diggons (b) imports, that had a ve been entered on the issue of non tenuit, the court w have entered a verdict for the same party on the cissues.

The plea of not guilty was a defence to the waction. Barker v. Dixon (c) was an action on

⁽a) 1 Saund. R. by Wms. 80, n. (1); 2 id. 300, n. (3).

⁽b) Stated by Lord Lyndhurst, ante, 941. (c) 1 Wils. R. 44

1834) Dibben

Marquess of Anglesea.

case for distarbance of common by inclosure. The general issue was pleaded, with a special justification under a custom for commoners to inclose ad libitum. That plea was proved, and a general verdict returned for the defendant. The court refused a motion for a new trial, on the ground that the plea of not guilty should have been found for the plaintiff, saying, that where several pleas are pleaded, each goes to the whole declaration, and if any one of them which absolutely destroys the plaintiff's action is proved, a general verdict for the defendant is right. In Hick v. Keats (a), where a court of error awarded a venire de novo to try issues on which the jury had found no verdict, the plea on which the verdict had been given was held to be no answer to the action.

by the arbitrator to enable the master to tax the costs, which would have been done at nisi prius by a similar finding of a jury on the general issue only. For if they had been discharged from finding any verdict on the other issues, the postea would take no notice of that discharge. So here, the arbitrator being silent as to the other issues, the situation of the parties is the same. The question whether the arbitrator was bound to decide every question raised on the pleas, including the justifications under *Hardiman*, depends on the special terms of this submission.]

The order of reference contains no directions to the arbitrator to find in what way the issues should be disposed of. His direction to enter a verdict for the defendants meant a general verdict. Such a finding by a jury would have sufficiently pointed out the proper entry on the roll. The jury being sworn to try all the issues joined, it may be right to tell them that some are become immaterial; but if that form

⁽a) 4 B. & Cr. 69. In K. B. on error from C. P.

should be omitted, they should not be called or

DIBBEN
v.
Marquess of
ANGLESEA.

proceed to find what would be repugnant to their finding. For though inconsistent defences may raised by different pleas, it would be error if it sh appear on one part of the record that defendants not, and on another that they had, committed trespasses (a). The submission contemplated the ca as one object, and the rights of such persons as sh become parties to it, as the other. Now Hard never became such party. Then the arbitrator not bound to inquire into his alleged rights, or to how far they or the rights of the parties to th ference corresponded with the allegations of the the pleadings. Lill is found to have no prospe rights in the locus in quo; it is therefore said, had the arbitrator proceeded to dispose of the issues, he would have necessarily found that Lill not the right there claimed. But though Lill 1 not retain it at the time of making the award, it ca be assumed that it did not exist at the time menti in the pleas. [Lord Lyndhurst C. B. As the jury found that no trespass had been committed by defendants, I do not see that Lill is differently situ from the other parties. Probably the arbitrate ascertaining and defining some of Dibben's and Pen rights, has in fact found and affirmed some of special pleas; but he has found no rights in Lill is contended for the plaintiff, that the arbitrator sh have applied his finding on the special matter of future enjoyment of the parties' rights, eo nomin the respective issues. But his tribunal had the pu to decide those rights generally.] Yabsley (b) the court say that the award is sufficien

⁽a) See on this subject, Com. Dig. tit. Pleader (S. 48.)

⁽b) 5 B.& Ald. 848. See Blanchard v. Lilly, 9 East, 197.

looking at the whole of it, it appears that the matter is determined. Again, the award in the hird cause, that the plaintiff had "no cause of action" against the defendants, is sufficiently certain; forit must be inferred, as in Hayllar v. Ellis (a), that the arbitrator considered the claims of both parties, and awarded accordingly. Nor could he award more specifically, no issues being yet raised. The latter part of the case is narrowed to the construction of 22 Edw. 4. c. 7. Its object was to enable persons not licensed by the crown to inclose woodland within a forest, chase, or purlieu, after felling the trees, without affecting crown rights. Barrington's case confirms that view of it. (The Court here stopped him.)

DIBBEN
v.
Marquess of
Anglese,

Barstow in reply. Assuming that a judge or an arbitrator possesses a power to discharge a jury from finding a verdict on such issues as he may deem immaterial, and exercises it, the fact of that discharge should appear on the nisi prius record; or the entry on each roll would be as to one issue only, without showing the result of the rest, and it could not be sent to a court of error. In Powell v. Sonnett (b) it was possible to make up the roll from the nisi prius record, so as to dispose of the issues. The arbitrator has not directed the officer to alter the verdict taken for the plaintiff in the second cause, except on one issue. Then can it be implied from the award that the officer is authorized to make an entry of a verdict for the defendant on that issue, and to alter the verdict as to the rest, by stating a discharge from entering any verdict as to the others? [Lord Lyndhurst C. B. The question is, whether the award is sufficient to show what the arbitrator meant?

952

DIBBEN
v.
Marquess of
Anglessa.

If error was brought, mould the entry on the the award "that a ver ants accordingly."] W for the defendants undeset up in their pleas whave been found by the

The nisi prius record a charge the jury from issues, or the court musthem.

م الكومين عابرا Lord LYNDHURST (general finding of the had not committed the have been material, to the other issues, except satisfied that as Hardin the reference pursuant the arbitrator was not be thing respecting him, u enter a verdict on the request appears to have has substantially dispose court may make up the been tried at nisi priv charged from trying th opinion that the act 22 woods in which rights a reasons given for Lord C case, as reported in 8 answered, though it ap burton J. dissepted. W Marquess of Anglesea or c. 7. seems to have been also of opinion that 35.

by section 7. no several

Division of Anglesson.

1884.

which there is immemorial right of common, can take place in order to inclose it before felling, except under certain regulations minutely detailed in that section. Section 8., which provides that that part so severed, bounded, and set out "in manner and form aforesaid," shall be sufficiently inclosed and fenced, and the inclosure kept up for seven years, also imposing a penalty upon any beast put in during that time, is distinctly limited to the woods described in section 7., i.e. to those in which there has been common from "time out of man's remembrance." In these causes, however, the commons are claimed, not by prescription, but grant. This rule must therefore be discharged.

distributed and many a surreture to be contain accurage

305 PANKE B. The arbitrator has specifically found the rights of persons who came in as parties to the submission pursuant to its terms, and has disposed of call the matters substantially in dispute between the parties. Each party, however, had, at the time of the reference, a right to call on the arbitrator to enter a verdict on the remaining issues, in order to determine the costs of those issues; but as this was done by weither they must be taken to be in the same situation if the jury had been discharged, on a trial, from giving a verdict on those issues: The rights of Hardiman to common could not have come under consideration on these records. The result is, that in The Marquess of Anglesea v. Dibben and Lill, the defendants will have the general costs of the cause on the general issue, and neither party will have any costs on either of the other issues. On the special facts stated by the arbitrator for our consideration, I entirely concur with the lord chief baron on both points.

BOLLAND and GURNEY Bs. concurring,

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or figure of the action of the

Rule discharged.

DIBBLE U. Marquess of Algelisea.

In Michaelmas term 1834, Barstow moved in Marquess of Anglesea v. Peyton, Dibben, and for a rule to review the taxation, by which the m allowed the defendants the costs of all the p This cause, though not at issue at the assizes at v the other causes were referred, was included it submission. He contended that the costs shoul taxed on the same principle as in the action as Dibben and Lill. Secondly, the master allowed defendants the whole costs of the reference, the the verdict, which was entered generally for the p tiff, was only altered by the arbitrator on one issue many of the eleven days occupied in the reference spent in ascertaining the rights set up on the issues.

Lord Lynnwart C. B. as to the first point.—cause having arrived at the pleas, was referred it stage of it. Then the agreement is "that the co the respective causes, and of so much of the reference may relate to the said causes, do abide the event said causes respectively;" so that they do not do on the event of the issues. As no issues exist this case, the arbitrator had no power to decide did not decide any thing on the pleas, but adjut that the plaintiff had no cause of action. Then a defendants' costs incurred in their defence must for

On the other point, Manning for the defence said that the ascertaining the commoners' rights or reference, took place principally with a view to 1 the contemplated act of parliament; and that arbitrator had awarded all the costs over which had control to be paid by the marquess.

Barstou supported his rule, and claimed to be alle

17:1 1

the costs of a judgment for the plaintiff in the second cause on demurrer to the sixth plea, the record being now to be made up.

1894. DIBBER Ð. Marquess of ANGLESEA.

Lord Lyndhurst C. B.—The master certifies that he allowed the marquess one day's expenses on account of that part of the costs of the reference which applied to matters not in issue in the causes. The award of costs covers the whole.

, PARKE B.—The costs now in question are those of the pleadings only; and we are bound by the order of reference directing the costs to abide the event of the causes. It might have been made a part of that order that the arbitrator should distinguish as to these costs. The arbitrator has in fact nonsuited the plaintiff. The arbitrator should have been asked to award to the plaintiff the costs of the judgment on demurrer.

ALDERSON B.—On a nonsuit all the costs are taxed against the plaintiff, he being supposed to have agreed to that step instead of going to the jury. That case resembles the present.

Rule discharged.

BAZLEY against THOMPSON.

THESIGER showed cause against a rule to set Irregularity in aside an interlocutory judgment signed by the de- appearing by a fendant in an action of replevin. The ground for sign- not an ating judgment was, that the plaintiff, in an action of torney of the court, does not replevin removed from the sheriff's court, appeared by entitle the opone Frank Dickins, who was not an attorney in the sign judgment, book kept at the office of the clerk of the pleas, pur-but only to suant to Reg. Gen. Mich. 1 Will. 4., but his residence aside the pro-VOL. IV. 3 s

move to set coodings.

BAZLEY
THOMPSON.

was described of 60 Nelson-square. On inquiry that and in the neighbourhood, no such person was for In Hawkins v. Edwards (a) where process appearable sued out in the name of Yates by Luttrell, as of them being attornies of the court in which is sued out, and Luttrell had no authority from any attorney to act in his name, the proceedings were aside, with costs to be paid by Yates and Luthbott v. Rice (b) differs from this case.

Heaton contra. Though this was a clear irregul upon which the court might, on motion, set asid proceedings, they were not so ipso facto null authorize the signing judgment. For all that ap this person may be an attorney of the King's B though not on the rolls of this court. He cited I v. Pribble (c).

Lord Lyndhurst C.B.—Application should been made to stay the proceedings, for they cann treated as a nullity where the party appears by a who is an attorney.

PARKE B.—How is the client to know that he ploys a man who is not an attorney? In Wel Pribble it was held, that a bail-bond should not be celled because the attorney who took out the writ neglected to take out his certificate. There he liable to penalties for practising without a certificate

Rule absolu

⁽a) 4 B. M. 603.

⁽b) 3 Bing. 132.

⁽c) 1 D. & R. 215.

was described of 60 Notes given. On income there, and in the reighbourneous assummers and found In Hankins w. MANARH terispony & H.W.s. appeared to



A SOUMPORT for goods sold and delivered. 1 Pleas, In assumpsit general issue, and that the causes of action did and delivered, not accrue at any time within six years before the come the general issue and a mencement of the action. "Similiter" and replication plea of the traversing the second plea. The action was commenced mitations were in March 1832. At the trial before Taunton J. at the pleaded. The Lent assizes for Leicestershire in 1834, the plaintiff's plication trashigh witness stated, that having received a letter from versed the latter plantish stated, that having received a letter from the evidence condescribed and said," It had been standing a good bit," and by the defendant said," It had been standing a good bit," and by the defendthe witness was not certain whether he did not add, have been evifor six or seven years." No evidence was given in dence to go to support of the replication to show that the debt was general issue, contracted within six years, nor was the time of dethat a debt system by the defendant to have from him to be judicially to the goods shown by the defendant to have from him to be judicially to the alliance of the manufacture of the statement o taken place at an earlier period. The learned judge the plaintiff; action did not arise more than six years ago? He the debt was contracted. directed a verdict for the plaintiff for the amount of superior of the plaintiff for the amount of the plaintiff for the amount for evidence was given for the defendant in support of the plaintiff for plainti

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Balguy and Humfrey showed cause. As the time when the debt was the debt was contracted did not appear, the defend- contracted ant's expression primâ facie admitted a debt, for which years, or that he might legally be sued. [Vaughan B. If it admitted the acknowledgment or

terms of his replication, by showing that within six promise was

made in some writing signed by the defendant, so as to take the case out of the statute, pursuant to 9 G. 4. c. 14.;—and a nonsuit was entered accordingly.

-1/ HM THE EQUADE YEAR OF WILLIAM IV.

YAUGHAN B. (a) delivered his judgment. This was an action for goods sold and delivered; the pleas were the general issue and the statute of limitations, actio non accrevit infra sex annos. One witness was called; he said, that having had a letter from the plaintiff's attorney claiming a debt from the defendant he carried it to him. The defendant said, that it had been standing a good bit, and the witness could not undertake to say, whether the defendant did not add, that it had been standing for more than six or seven years. No other evidence was given one way or the other, to, show when the demand arose. The learned judge being then called on to ask the jury whether it did or did not arise more than six years before action brought, declined to do so, and directed a verdict for the plaintiff, with leave to move to enter a nonsuit, for want of affirmative proof by the plaintiff that the goods were delivered within six years before action brought. has been argued to be incumbent on the plaintiff to show positively that it arose within that time, as the party who maintains the affirmative is bound to prove If the plea of the general issue only had been on the record, without that of the statute of limitations, there would have been sufficient evidence to go to the inty, as an admission of a debt; but with the other plea of the statute on the record, was there any evidence from which the jury could draw the conclusion that it arose within six years? As to the necessity of the affirmative being proved, Lord Tenterden's act 9 G. 4. c, 14, after reciting that "various questions have arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out WILEY

v. /

HENMAN.

⁽a) Lord Lyndhurst was sitting in equity.



of the operation of the 211 Jac 1 . c. 16 and 10:6 that in actions medalita any simple centracts no! worth stoly aballihe sleet on contituting lepatractes the onduction of the said office descrive any party of adlandwied gwent-or proi by or in some writing to able therete sallt is d potober fritterede averyddi different in circumstanc premissory inche appea thore than dixo years of the defendant; was ease case, as he had paid the before.", It was conten ment by admission, an a provise of the 9 Seois contained shall alter, or of any payment of any any person whatsoever: applied to the fact of pa tion of payment, which w to have made, and the d the circumstances of thi sary to prove the affirm the plaintiff has not don

BOLLAND B.—The q not imperative on the p of the issues joined. B "I do not owe you the

slight a debt as the rules of law allow to be recovered." The plaintiff only offers proof of an admission that the defendant told a person whom he sent that he owed him a semment This would have been condustve the first issues but! on the second the defendant pass the plaintiff to prove the issue he (the defendant) tendered, visu that the debt was contracted within the time required by the law. If we held, this plaintiff's best to be sufficient to enable; him to recever; we should commendate to plaintiffs to defeat the statute by evidemon, which if offered in order to take a case out of it; would not have been admissible for such a purpose. achieved in premistance the read the retied on a odWilliams B.—To hold for the plaintiff on this record would be to take away the plea of the statute of finitations, and to leave the record as if only the gement have had been pleaded. Though the admission proved would have been sufficient prima facte evidence of a cause of action, had only the general issue been pleaded, still under the special plea of the statute,

Rule absolute accordingly.

some written evidence should have been produced for plaintiff to take this case out of the statute of limitations in the manner provided by 9 Geo. 4. o. 14.; and as there is none such, a nonsuit must be entered.

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WILEY HENKAN. 1834.

Mellor against BADDELEY and Another.

In an action ngainst a party for maliciously and without probable cause informing against the plaintiff for an offence, it is a sufficient answerto say that the plaintiff having been convicted of trespassing on land in pursuit of game, in the day-time, un-W. 4. c. 32., underwent the sentence of imprisonment according to that conviction, without appealing against it within the time, and in the manner, pointed out by section 44 of that act.

CASE. The first count of the declaration st that the plaintiff is a good, true, and faithful ject &c., and hath never been guilty of posching of lawfully been guilty of any trespass in search of g &c., yet that the defendants, contriving, &c. on appeared before one J. S. one of the justices and maliciously, and without any reasonable or bable cause, caused a certain false and maliciou formation to be exhibited against the plaintiff, that he the plaintiff did, on &c. unlawfully come trespass by entering and being in the day time I a certain common or piece of land, in the der stat. 1 & 2 session and occupation of D. B. Baddeley ther search of game, and, upon such information, m ously, and without any reasonable or probable or caused the said J. S. to grant his summons for summoning of the plaintiff before him the said on &c., then next, to answer the said informat that the defendants caused the plaintiffs to be se with said summons; that the defendants, on the maliciously, and without any reasonable or prot cause, caused the said J. S. wrongfully and iller to convict plaintiff of supposed offence in info tion specified, and to adjudge that he should fo 21, together with 11. 10s. for costs, and in de of payment be imprisoned two calendar months; that the defendants maliciously, and without bable cause, caused the said J. S. to grant his cer warrant of commitment, whereby the constable of St upon-Trent was commanded to convey the plaintil gaol, and the keeper of the common gaol was c manded to receive and keep the plaintiff in the gaol for two calendar months, unless the penalty

costs should be sooner paid; and that the defendants maliciously, &c. caused said plaintiff, under and by virtue of said commitment, to be arrested, and to be conveyed to gaol, and whong fully and maliciously eaused him to be imprisoned without probable cause for two calendar months, at the expiration of which said time the plaintiff was duly discharged and fully released from the said gaol.

The second count stated, that the defendants, contriving as aforesaid, on &c., charged plaintiff with having committed an offence punishable by law, to wit; with liaving committed a trespuss, as in the information set out in the first count, and that defendants upon the last-mentioned charge maliciously, and without probable cause, produced J. & to grant a warrant of commitment, whereby &c. (as in first dount) and that defendants, under aind by wirtue of maliciously and that defendants, under aind by wirtue of maliciously and that defendants, under aind by wirtue of maliciously as a female.

Third count. That defendants, on 17th April, mailineously, and without probable cause, produced the plaintiff to be arrested under and by virtue of another warrant of commitment, whereby the keeper of the gaol was commanded to receive and keep the plaintiff in his costody for two calendar months, unless certain sums of money, to wit, 2l. and 1l. 10s., should be sooner paid; and that the defendants maliciously, and without probable cause, procured the plaintiff to be imprisoned, under and by virtue of the said warrant, for two calendar months.

Fourth count. That the defendants contriving, &c.' as aforesaid, procured the plaintiff to be unlawfully imprisoned &c. and on &c., wrongfully, and without any probable cause, charged the plaintiff with having committed a certain other offence punishable by law, to wit, a trespass (as in the first count), and upon

1834. Mellor

BADDELEY and Another

American transfer

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BADDELEY
and Another.

such said last charge &c. wrongfully, and withous bable cause, under and by virtue of a certain wor commitment, caused the plaintiff to be arrest imprisoned for two calendar months.

At the trial before A. Park J., at the last St shire assizes, the plaintiff was nonsuited, on the 4 that as there existed a conviction against him 1 & 2 W. 4. c. 32. s. 30. for trespassing on la the day-time, against which he had not ap pursuant to s. 44. of that act, the action would as the prosecution against him could not be sh have terminated in his favour.

Greaves moved to set aside the nonsuit, a ground that as the proceeding complained of a licious, was not civil but criminal in its nature, a had decided that in order to maintain an actioniginating it, it must be shown to have terming the sought to distinguish Matthews v. Dicken and Whitworth v. Hall (b), on that ground, being a criminal proceeding, there was no mut for had there been a refusal to convict, the placehold not have proved that refusal in an action a him for trespass. He also cited Smith v. Rumma and other cases collected 1 Stark. Evid. 235, 6, a to show that the conviction could not be evider favour of the defendant in this action, for it we tained on the oath of one of the defendants.

The Court (d) intimated a strong opinion appropriate rule, but deferred pronouncing upor motion till after learning the precise nature of the dence adduced from the judge who tried the c

⁽a) 7 Taunt. 399.

⁽b) 2 B. & Adul. 695.

⁽c) 1 Camp. 9.

⁽d) Vaughan, Bolland, and William

Ebeir epinion was delivered on the dubrequent thay (depril 29) by the open of the order and acceptance of the control of the c

secondation coised the plantiff to be agreeted and

Mellon
v.
Baddeley
and Another.

1954

VAUGHAN B .- This was an antion against the defundament for maliciously and without probable cause hying an information before a magistrate against the plaintiff, and consists him to be imprisoned thereon. The declaration having set out the summons and a desiriction under the game act 1 & R.W. 4. c. 32. s. 30. alleged, that a penalty and costs were imposed by the conviction, for the hon-payment of which the plaintiff was committed to prison, and kept in custody there for two months. The action was not brought against the defendant for any act done by him in his character as an magistrate, but for maliciously laying an information without reasonable or probable cause. The plaintiff's commelin the course of his case, after having examined same witnesses, was interrupted by the statement of the counsel for the defendant, that they could produte a conviction under 1 & 2 W. 4, a 32. for trespassing in pursuit of game, which not having been appealed animate pursuant to section 44 of the act, afforded a conclusive answer to the charge of malice and want of probable cause for the information. The plaintiff was nonsuited, on the ground that he ought to have appealed within the time limited by sect. 44. We are of opinion that to support this action it was necessary that there should have been proof of a prosecution which had been discharged and put an end to, and also of want of probable cause and a damage sustained in consequence of the prosecution. The declaration contains counts, some for causing the plaintiff to be committed, and others for causing him to be arrested; but all substantially state the same cause of action, and the simple question is, whether this conviction unreversed must of necessity be an answer to the action,

MELLOR
v.
Baddeley
and Another.

as showing probable cause for laying the inform complained of? It is unnecessary to refer to cases, but there is one of Whitworth v. Hall(a) will direct the present. That was an action aga party for maliciously suing out a commission of ruptcy, which was not proceeded in, and therefor brought to an end. There Lord Tenterden said, action cannot be supported for maliciously holdi bail, without showing that the proceedings were end, and yet the discharge from arrest is in the d tion of the court;" and Littledale J. added, "th no distinction between the action for a malicious secution by indictment or for a malicious arrest, one for maliciously suing out a commission of bank In all of them it is necessary to show that the or proceeding which formed the alleged ground a action is at an end." In this case the conviction 1 1 & 2 W. 4. c. 32. being summary, section 44 giv the party convicted an appeal from it to the qu sessions, provided he gives the complainant a not writing within three days after such conviction, shall also either remain in custody till the session within such three days enter into a recognizan appear and try such appeal. The plaintiff in case neither gave notice of appeal nor entered such recognizance, but suffered the punishment awa on the conviction. Therefore, as he acquiesced that was conclusive evidence of probable cause, the prosecution was not discharged.

Rule refused (

⁽a) 2 B. & Adol. 695, 697.

⁽b) See Maney v. Johnson, 12 East, 67; Gray v. Cookson, 16 East Aked v. Stocks, 4 Bing. 109; 1 M. & P. 346, S. C.

normander of our excess of sever stilled a particle of CROWROOT and Others (assignees of STREATHER, a bankrupt,) against The London Dock Company.

TROVER for certain steam-engines, machinery, im- S. contracted plements, and building materials. The cause and with the defendants to all matters in difference between the parties were execute an referred to a barrister, who in his award certified, in building operapursuance of the submission, that the following were tion for them, the facts of the case, as proved before him.

'On 29th September 1829, a contract was entered tain sum, and of being alinto between R. Streather the bankrupt of the one lowed to use part, and J. Warre esq. as treasurer of, and for and on terials. The behalf of the London Dock Company, of the other part, defendants' as follows: That the said R. Streather should and empowered to would execute and perform, in a substantial and work- reject any manlike manner, the whole of the works required in the work not in

in consideration of a cermaterials or

to the plans and specifications, and to provide other materials, and employ com-petent persons to perform the work, if S. failed to do so, as well as to deduct the amount from the sum payable to him under the contract. The defendants were at Riberty to diminish or add to the works, paying S. at the contract prices accordingly, ar deducting from them if necessary. S. placed on the defendants premises steamengines, mil-roads, materials, implements, and other articles of various kinds, ne-classify to carry on the works. The defendants' engineer visited the premises daily, and rejected such of the materials brought thither by S. as he thought unfit for use. During the progress of the works advances were made by the defendants to S. on his application; he agreeing that all the engines, materials &c., brought or to be brought on the defendants' premises for use in constructing the works, should be a security for such advances. Those advances always exceeded the value of the property so on the premises. S. became bankrapt before the works were completed, upon which the defendants erased his marks on the engines, materials, implements, &c. then on their premises.

. In trover brought by the assignees of S. against the defendants to recover such engines, materials, &c. : Held, first, that the arbitrator had no power to award that the defendants were entitled to prove against the estate of S. for the sum advanced to him by them beyond the value of the work done and materials furnished by him, and of the engines, &c. agreed to stand as security. Secondly, That the plaintiffs were not entitled to recover for extra work done by the bankrupt. Thirdly, That as there had been such a possession of the engines, materials, &c. by the defendants as would support the lien, which it was the effect of the bankrupt's agreement to confer on them, the plaintiffs were only entitled to recover for such materials, &c. as were brought on the defendants' premises after the act of bankruptcy. Fourthly, That payments to the bankrupt by the defendants, after the latter portions of materials were brought on the premises, could not be considered as payments for those particular goods in the course of business, but as general advances only, so that they could not be retained by the defendants under 6 G. 4. c. 16. s. 82.

formation of an entrance from the river Tha

CROWFOOT and Others
v.
LONBON DOCK

Shudwell, to the Eastern London Dock: that the docks should be commenced at such period directors of the said company should appoint giving the said R. Streather twenty days p notice, and the whole be completed within months from such period. R. Streather did : contract, promise, and agree to provide at hi expense the whole of the materials, labour-c tools, implements, and every other matter or which might be required in the formation and pletion of the said entrance; and also to execu whole of the works as laid down and describ certain plans and specifications thereunto au according to the particulars and conditions t contract, in consideration of being: paid the s 52,2001., and also of being allowed to appropriate own use the materials of the houses and po therein referred to. It was also agreed that suc of the materials as should be approved by the en of the said company, might be used by the said R. ther in the works to be performed under that con the remainder were to be removed by him in confi with the directions which might be given to him ! said engineer. The said engineer to be the sole of the said works, and every part thereof being cuted and performed agreeably to the plans and cifications, and to have the power of rejecting time any materials or work which in his oninion s not be in conformity therewith, and to provide materials in lieu of those rejected, and employ petent persons to perform the work, if the sai Streather should fail to do so; in which case the or amount thereof, should be deducted from the a become due and payable to him under the con The said directors were to be at liberty to alte plans, and thereby add to or diminish any part of the intended works, without prejudice to or making void thist contract; in which case a proportionate addition or deduction should be made to or from the sum to be paid to the said R. Streather, the amount of such addition or deduction to be computed according to the schedule of prices contained in the said specification. The said J. Warre did thereby undertake, promise, and agree, for and on behalf of the said company, to pay to the said R. Streather the sum of 52,2001. by the following instalments, upon the production in each case of a certificate signed by the company's engineer; viz. three-fourths of the cost of the work certified to have bleen done every two months. The first instalment to be paid whenever the said engineer should certify that the portion of work performed amounted in value to one-eighthe of the whole, the remaining one-fourth within one month after the full completion of that contract. By a memorandum of agreement under seal, bearing date the 21st December 1830, the time allowed to the said R. Streather for completing the works was extended to the 28th March 1831.

On the 14th December 1829, the company gave notice to Streather to commence his works on the 28th of that month. Streather accordingly commenced his operations, inclosed the premises so as to exclude the public, had them watched by persons in his employ, and brought to them a great quantity of property of various descriptions in the building line for the purpose of carrying on the works. He had a counting house and clerks on the premises, and erected thereon two steam-engines. The barrows, carts, picks, and other implements used in carrying on the works; were branded with his initials. M. Palmer, the company's engineer, superintended the works on behalf of the company, examined the materials brought upon the

CROWFOOT and Others
v.
LONDON DOCK

COMPANY.

CROWFOOT and Others v.
LONDON DOCK COMPARY.

premises by Streather, and rejected such as he d think proper for the purposes for which they intended. Palmer resided in a house belonging dock company adjacent to the docks, and about yards from the works in question, and was on the mises every day; the whole of the premises who works were carried on, and upon which the mac and materials were placed, belonged to the cor The arbitrator then certified, that on the 17th and before Streather was entitled by the terms contract to receive any money from the dock cor he requested an advance; that the company, 18th May, advanced him 3000l.: that in July he a to them for further advances, referring them : engines, rail-roads, implements, and materials ly the dock premises as their security. He then ! certain letters which passed between the compar Streather on that occasion as follows :-

" London Dock House, 20 July 1

"Mr. Streather is requested to furnish the becount in his power to form of the costs of the works, so far as he has at present proceeded, guishing materials employed for the works, such steam-engine, rail-roads, platform, carts, barrow Secondly, materials used in the works, such as the iron, stone, bricks, lime, &c. Thirdly, wages for vators, bricklayers, carpenters, stonemasons, &c. Streather will also state the value of the mataken of the company which have not yet been but which remain on the premises.

" S. Ca

To which Streather, on the 21st July, wrote an a letter containing the following passage:—

" In obedience to the wishes of the committee to show that, in point of expenditure made by requiring an advance of money, I am not doing it improperly, nor exposing the committee to any risk, I have made an estimate of the work really performed, the nearest account of the expenses necessarily incoursed in the immense preparations required for carrying on a work of such magnitude I can give, and also the value of materials, implements, &c. now on the

and Others

company's premises, and intended for t		"		•
This letter was accompanied by	the	follow	ing	ac-
count':—				
Web Entrance London Docks Expe	endi	ture to	o ti	re "
20th July 1830.		1	•	
Materials employed for the	Wo	rks	٠.,	
Machinery.	,, ,	_		، ا، و
To dish pard for 30-horse power steam-engin	t ,	. ₤. - 950	<u>.</u> ,	<i>d</i> .
Ditte mid sheineer for fitting up ditto -		- '90	Ö	0
Labour and waste of materials in settli	'n'n			
	mg '	300		
Twelve rods of brick-work, masonry 16L 8s.,	iron	_		
work &c. at least	,ion	- 100	0	٥
Sinking the (well shad of pumps, iron and	WOO		٠.	
A Chinders, &c		- - 1000	0	0
Extra boiler for said engine ,		- 150	0	0
Labour.				
To pile driving, to setting said engine the	econ	d		
time, viz. for pile driving, labourers' an	d car	•		
penters' time thereon, and to framing ti	mbe	Γ,		
iron work, to shooing piles, and 11 ton o	f iro	n		
in bolts, ties, &cc. and 34 rods of brick-	work	500	0	0
Machinery for connecting the pumps -	•	- 200	0	0
Pumps, as per invoice	•	- 179	10	0
To a 10-horse-power engine	1	470	0	0
Fitting up do. 2001. a new boiler for do. 221	. 10s	. 222	10	0
Consumption of fuel for both engines	•	- 413	11	10
Legon: rail roads, as per invoice	•	- 500	0	0
Twelve iron and 12 wood carts, and 50 bar				0
Labour to erection of a platform and stage -	• .	- 250		0
Bridge and steps for foot passengers	•	- 900	0	
•		5360	11	10

CASES IN EAS

1834.

CROWFOOT and Others

LONDON DOCK COMPANY.

The account the done, and materials the work, to the an

On the 23d July count, wrote to Str

"L

"SIR,-It appea receive, according t with the London L your representation the greatest possibl you are anxious to as nearly as possit ployed, or lying u forming or being works which you co any advance which make you beyond t work, according to pany's engineer to I shall also thank y venience, your esti ally executed accor

To which Streat sent the following a

"SIR,—In answeated the return ther observe, that if the below, are deducte first article of 536 main the sum of 44

company for any advance they may be pleased to make beyond the proportions stipulated by the contract."

The items at the foot of the letter were as follows:-

CROWFOOT and Others

UNDOW DOOK
COMPARY.

First setting of the large engine -					•		£. 100	Q	0		
Fuel for be	oth	engın	es	-	-	-	-	-	4.13	11	10
Labour to the erection of the platform						-	-	250	0	0	
Security	-		-	-	-	-	-	-	4597	0	0
en e								5360 11 10			

The arbitrator found that the company made advances to Streather beyond the sums which he was ientitled to receive according to his contract; and that Streather agreed that all the engines, implements, and materials on the premises, and from time to time brought upon the premises, to be used in constructing the works, should be a security to the dock company for their advances; and that the company made advances on the faith of that security, and from July 1830, down to the bankruptcy of Streather, were always in advance to an amount exceeding the value of the property on the premises; but Streather was allowed to use the engines and implements, and carry on the works in the same manner as before any of the advances were made; nor did the dock company do any thing towards taking actual possession of the property until after Streather had quitted the works, when they erased Streather's marks and put the letters L. D. C. on the engines, implements, materials, &c. On the 1st of November 1830, Streather had received of the company 32,050l. in cash, and materials of the value of 35001., making together 35,5501., and had performed work to the value of 23,000l. On the 6th November Streather made by his clerk another application for advances, and pointed out, amongst other things, the steam-engines, iron-rails, and materials on the preTH

Chowpoot and Others

builden Dock
Company

mises, as constituting a security to the company. company requested some farther security. Where Streather offered to assign to them a debt of 2 due to him from the Union Building Society. was accepted as security for that sum; and has been paid off by the building society. 'On the March, Streather committed a secret act of 1 ruptcy, which remained unknown, and the works continued by his servants and workmen until the April, when he finally quitted them. A commissi bankrupt was issued against him on the 21st 2 Before this act of bankroptcy was committed. Street had received from the company 47,4481. in cash the 19th March he received a further sum of & and on the 25th 337%, making together 48,165% they afterwards, in the months of April and Jane; for bricks &c. which had been supplied on their c for the use of the works, the sum of 1464. The done by Streather up to the 14th March was at contract prices of the value of 34,3881., and he a wards did work amounting to the value of 20411. When Streather's bankruptcy became known, an ceased to carry on the works, the company took session of the engines, machinery, implements, some had been on the premises from the 20th. 1830, and were taken possession of by them, of value of \$310/.; others were brought to the mises by Streather between 20th July and 28th cember 1830, and these, when taken possession o the company, were of the value of 6542.1. The bi and stone on the premises when Streather quitted, which were taken possession of by the company, of the value of 4421. 2s. 6d., were supplied a Streather had committed an act of bank'upter, the whole of them were supplied to Streather on

credit of the company, and were paid for by them. The company, since Streather's bankruptcy, have completed the works as far as practicable, according to the scale of prices in Streather's contract of 18,8751.3s.2d. Of the work done by Streather, a part, to the value of Company (41401, 1324) was for extras occasioned by deviations from the original plans, and some things were omitted out of the original plans, which occasioned a deduction to the amount of 4081 16s. 10d., but both rextras and omissions were taken into account in making the valuation of work actually done by Streather before the 14th March 1831, amounting to 34,3881. On 21st April 1831, a commission of bankrupt was duly issued against Streather, under which the plaintiffs were duly chosen assignees; and on the 24th May 1831, they demanded of the dock company the engines, implements, and materials above mentioned, and which had been taken possession of by the company. The company refused to deliver them, and afterwards used and applied some of the materials in finishing the works, and sold others, and some still remain on their hands. The plaintiffs claimed a right to recover in the action 5173L the value of the property of which the company took possession when Streather ceased to carry on the works. As to that claim, the arbitrator awarded that the plaintiffs were entitled to recover in the action one shilling damages only; but if the court? should be of opinion that they were entitled in their action to recover any larger sum, then he awarded, that the plaintiffs were entitled accordingly. plaintiffs further claimed from the defendants the sum of 41494, 13s, 6d., the value of the extra work done by Streather, and which was made necessary by deviations from the original plans and specifications. of this extra work was included in the valuations of the

1834. CROWFOOT and Others

work done from 1

CROWFOOT and Others

1834.

u. London Dock Company. surveyor's report to arbitrator awarded to receive that su company, but if t the plaintiffs were part of that sum fr that the plaintiffs other hand, the co to. Streather 48,1. together 49,6191 .: was only 36,429l, must be consider Streather: that th &c. had as a secu provided for, which prove under the co that, the arbitrato were entitled to p sum of 80171., an he awarded that t ingly. In Trinity

F. Kelly for the cause why the awa creasing the dama striking out so muc company should be commission for the

F. Pollock, Folla cause for the defe rely on this point, tl dict entered for 517 materials which we

CROWFOOT and Others to.
LONDON DOCE COMPANY.

became bankrupt; and the argument is, that although the arbitrator, found that advances were made by the defendants to the bankrupt beyond that amount, upon an agreement that the defendants were to have a lien on the machinery and materials, still no sufficient possession passed to the defendants for the purpose of creating a lien. Next, it will be said that the bankrupt was allowed to have the order and disposition of the machinery, materials, &c. at the time of his becoming bankrupt; in which case it is said that the right of the property would pass to the assignees under section 72 of the bankrupt act. It is true there can be no lien without possession; Kinloch v. Craig (a), Patten v. Thompson (b), Taylor v. Robinson (c). But in those cases the parties claiming the lien had no sort of possession; here, the defendants certainly had some possession. The property in question was brought, placed, and left on their premises; and though that part of their premises is found by the arbitrator to be inclosed, that inclosure was only for the purpose of excluding the public. The defendants, and especially their servant the engineer, obviously continued to have free access to them. In this case, possession of the property has been given in the only way which the circumstances of the case rendered possible. Had the bankrupt been altogether excluded from meddling with the property, the very object of the transaction would have been frustrated. The case of Manton v. Moore(d) is a strong authority in favour of the defendants upon this point, though it is true that it was not a case growing out of the bankrupt law. Supposing then that the defendants would at common law be entitled

i,(4) 3 T. R. 119.

⁽b) 5 Maule & Selw. 350.

⁽c) 8 Taunt. 648.

⁽d) 7 T. R. 67.

to the benefit of the 1834.

CASES IN EAS

72 of the bankrupt CROWFOOT It is submitted t and Others

LONDON DOCK COMPANY.

as respects a consid pute, viz. the engin

freehold. It is cl which applies only

affect the case; I section contemplat

puted owner and punishment on the

to be reputed owner right of property p

rupt therefore was

the case does not the bankrupt act,

reputed owner too

Hodgson (c). No.

from this construct bankrupt unites the reputed owner, the

case where a lien

rupt was the reput meaning of this sec omitted to draw tha

(a) 9 Bast, 215; see m

Ward, Ambler, 113. (h) 1 Scho. & Lef. 311.

5 Russell's Rep. 346; Stew

Adol. 72. Hubbard v. Ba

thirdly, by waiving facts of the case, a

are not by any mea

signees; not indee the general convey

has found are inconsistent. Collins v. Forbes (a) is almost an express authority for the defendants; indeed the claim of the assignees in that case was more plausible than that of the plaintiffs in the present, for the goods were there received into the victualling yard as the goods of the bankrupt, without any sort of compact with the commissioners, which would prevent his dealing with them as his own. But, fourthly, if the facts found do lead to the conclusion that the bankmint, was quodammodo intrusted with possession of the goods, those facts, at the same time, show that it was a possession for a special purpose, viz. for the purpose of applying those materials &c. to the performance of his contract with the company; and if so, there is a well recognized class of authorities to show that such a limited possession does not bring a case within this section of the bankrupt act; Ex parts Flynn (b), Copesear v. Gallant (c). But, secondly, the plaintiffs contends that if they are not entitled to have a verdict entered for 5173L, the price of the engines, materials; &c which were on the premises at the time of the bankruptcy, they are at all events entitled to have a werdict entered for 316L, the value of certain bricks brought on the premises by the bankrupt after his bankruptcy. The arbitrator, as to these, has found as safact that those bricks were supplied on the credit of the company and paid for by them. The affidavits show that the evidence did not establish that fact; but admitting the arbitrator to have been mistaken in finding in the court will not send the matters back to him if other facts are found which are sufficient to sustain the award. Now that is the case here; those bricks were supplied before the date of the commission, and may there-

Epinopolis and Others D. London Book Court part

⁽a) 3 T. R. 316.

⁽b) 1 Atkyns, 185.

⁽e) 1 Peere Wms. 314.

fore be considered a

3374, which were

1834.

Crowroot and Others

u. London Dock Company.

bankruptcy on the those payments are bankrupt act, Cash were before the delinot alter the case, here shown that the In Bishop v. Craus given in advance fo payment was conside was said that the de the time he accepted fore certainly not v Jac. 1. c. 15., but th corresponding section The next point raise are not entitled to h arbitrator, on the ref should have found the sum of 41401. 13 the bankrupt; agains could not set off the the non-performance works, and the extra as forming one entire By the terms of the as intended to form a addition or deduction sum to be paid to Rwere not to be blende

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so paid for, how were trupt to be paid for the he to wait till the fine

CBOWFOOT and Others

LONDON DOCK

COMPANY.

It is manifest the items of extra work were to be added to the periodical payments stipulated for by the contract; and if so, they have already been greatly overpaid. (The Attorney-General here intimated that he dill not intend to press this point.) The only remaining politic is, whether the assignees are entitled to prove 80201. 4s. against the bankrupt's entate It is objected that this constitutes an item of unliquidated damages. and cannot therefore be proved under the commission; but it can easily be shown that to the extent of that stim, at least, the damage of the company is already liquidated, whatever further loss they may have incurred. [Parke B. The arbitrator had no authority to decide that matter: it could not be done behind the backs of the commissioners and the creditors. could not make any award on that point which could bird the commissioners.

Sir J. Campbell (Attorney-General) and F. Kelly contra. The plaintiffs are entitled to have the verdict entered for the full value of the machinery and materials. mot necessary for them to resort to section 72 of the blinkrupt act 6 Geo. 4. c. 16., to which however the principal part of the argument on the other side has been addressed. The assignees are entitled to recover the value of the machinery and materials independently of that enactment, for it is in effect conceded by the defendants that the property in the machinery &c. remained in the bankrupt. They would therefore pass to his assignees, unless the defendants are entitled to Hold them by virtue of the lien; and it is submitted that they had no such right. To the creation of a valid lien at common law, under such circumstances as the present, two things are essential; first, it must be shown that there was a binding agreement to that effect; secondly, it must be shown that the goods

1834.
CROWFOOT und Others
v.
LOEDON DOCK

COMPANY.

were put into the company's possession, Kin Craig (a); and it must be actual possession; ? v. Clent (b), Taylor v. Robinson (c). It may be tended that here there was never any binding

tended that here there was never any binding ment that the company should have a lien machinery and materials for the amount of th vances. The bankrupt states in his letters whats he could give, but it does not appear that it tually given; but, admitting that there was su agreement, still there was no sufficient delivery session to give legal effect to it. The proper kept on premises inclosed for the purpose, and w by Streather's servants; and the arbitrator ex finds that Streather was allowed to use the engin implements, and carry on the works in the same t as before any advances were made; nor did the pany do any act towards taking actual possess the property until after Streather had quitte That was after he had become a ban how then can it be said that the company eve such a possession as would support a lien? Co. Forbes seems at first sight a strong authority! defendants; but Lawrence J., who was in that expressed his disapprobation of it on a subsi Gordon v. East India Company (d), at occasion. case of Manton v. Moore (e), on which reliance also been placed by the other side, are wholly in cable to the present case: The latter was not a lien, but was merely a decision what delivery of poss would be sufficient to negative fraud so as to pro vendee against a subsequent execution; besides 1 it is to be observed, that a symbolical deliver there given. That case therefore leaves wholl

⁽a) S T. R. 119. (b) S Pri. Rep. 547. (c) 8 Taunt.

⁽d) 7 T. R. 237. (e) 7 T. R. 67.

touched the question, what is a sufficient delivery of ciosession to support action for terror in both the transport -melipse the second point; the plaintiffs are clearly entitled to have a verdict entered for such of the bricks brought on the premises subsequent to the act of bankruptey, as were not supplied on the credit of and paid for by the defendants. The arbitrator has found that they were all supplied on their credit, and paid for by them qubut the plaintiffs a fidavits show, that as to the 3161., this was not the fact, and those affidavits are not contradicted; by the defendants. 1. [Parks B: There dertainly seems to have been a mistake as to some of the bricks in that respect, and unless you can agree then the amount, it should be referred back to the arbitrator to re-state that part of his award.] Upon the subject of the proof under the bankrupt's estate, the arbitrator had clearly no right to adjudicate. Court intimated, that on this point they thought the award could not be supported. bea

PRARKE B. (a)—This motion was made to alter the leatined arbitrator's award on several distinct grounds, some of which have been already disposed of in the course of the argument. So far as respects the adjudication that the defendants were entitled to prove under the estate of the bankrupt a debt of 80171, we have given our opinion that that part of the award must be set aside. The right of the defendants to prove any debt, or the amount of the debt which (if any) they were entitled to prove under the bankrupt's estate; cannot be considered as a matter in dispute between the assignants and the defendants. Other parties are interested in those questions, behind whose backs it would be impossible for the assignees and the

Cnowepht and Others v.
London Book

⁽a) May 6. Lord Lyndhurst was sitting in equity.

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CROWPOOT and Others v.
Lostboar Dook Conspany.

defendants to determine them. We think the that the arbitrator had no right to adjudicate matter at all; as he himself indeed appears a thought by the terms in which he has can worded that part of his award. That part of the must therefore be set aside, in order that, if no the case may go before the commissioners wither judice from the judgment of this court either we

Another objection taken to the award on mothe rule was, that the erbitrator ought to have that the plaintiffs were entitled to recover fredefendants the amount of the extra work done bankrupt: however, as the extra work was still done under the contract, which actually provide and as the work done under the contract has over paid, this objection could not be support has been abandoned by the learned counsel in plaintiff.

But the principal question in the case is, v the plaintiffs are entitled to have the verdict in from one shilling, to 5173l. the amount of the ma and materials, or whether, as to that, the defe were entitled to insist on a lien given to them: are of opinion that the arbitrator was warran arriving at the conclusion he did upon this part subject. The learned baron, after stating the found in the award, added, that up to the time the advances were made by the defendants, th the one hand, had no property in the materials b on their premises by Streather, which he migh away and change at pleasure; while, on the hand, he had no exclusive possession of the h which they were placed, so as to support tru He afterwards applied to the defendants fo vances, and, by way of inducement, pointed ou enumerated the machinery, &c. brought by him t

then lying upon their premises. Large advances were shen made to him by the defendants, on the clear undevitanding of both parties that the machinery and ma-Serials on the premises were to be a security for them. London Dock What then is the effect of the agreement between .these parties? At first it was said that it transferred the property in the machinery and materials, so as to occasion a question to arise on the construction of € Goo. 4. c. 16. s. 72. as to the apparent ownership by the bankrupt. Upon the terms of the letters, joined with the nature of the subsequent enjoyment, I cer-Sainly should have thought that if the property had passed, the assignees would have had no claim on the ground of apparent ownership; for directly the materials : &c. were placed on the premises, they were only subject to the special use of the bankrupt, which was the case of : Collins v. Forbes (a). But the effect of the agreement clearly was, not to transfer to the defendants the property in the articles placed on their premises, but to give them a lien on them. And the only real question has all along been, whether there has been such a Mossession by the company as would support that lien? and I am of opinion that there has. It is impossible to lay down any precise rule as to the sort of possession which is requisite to give validity to a lien, and each case must principally depend on its own circumstances; but Bere the defendants had a possession which was not more equivocal or less exclusive than the nature of Their transaction with Streather required. Had they Taken any possession more strictly exclusive, the whole object of making the advances, to secure which the Hen was given, would have been defeated. It would be going too far to say that the law rendered such exclusive possession necessary; and the case of Manton

1884. CROWFOOT and Others COMPANY.

(a) 3 T. R. 316, 522.

CROWFOOT and Others
v.
LONDON DOCK
COMPANY.

v. Moore (a), though not exactly on the same s is however worthy of consideration, as showing t not required by the law. Though Streather has permitted to use the engines and materials for ticular purpose, they remained on the defendan mises, and under their control. On the who principally on the language of the letters, I agr the arbitrator that the defendants were entitled benefit of a lien as to all the machinery a ter'als brought on the premises before Stream came a bankrupt. But as it appears that a consi quantity of materials were brought on the pren the bankrupt after the act of bankruptcy, t would not extend to them; for when so brough were in truth the property of his assignees, th The learned arbitrator has however four the company is entitled to retain even these n on another ground, viz. that all of them were s on the credit of the company, and paid for b But it appears from the affidavits that the f otherwise, and we think that the defendants retain that part. It was argued, that as paymen made to Streather by the company subsequently time when those materials were brought on t mises, and more than sufficient in amount to cou the value of them, the defendants are entitled sider them as in fact paid for, and that the therefore retain them under an equitable const of 6 Geo. 4. c. 16. s. 82. But we are of opinion payments in question cannot be considered as p for these particular goods in the course of b but merely as general advances; and that be the claim made to protection under section 82 here be supported.

IN THE FOURTH YEAR OF WILLIAM IV.

Bolland B.—I concur. *Manton* v. *Moore* very closely resembles the present case. The difficulty which there arose from the bill of sale, is here presented by the terms of the letters.

CROWFOOT and Others
v.
LONDON DOCK
COMPANY.

ALDERSON B.—I think that under the circumstances the arbitrator has drawn the right conclusion in inferring that the defendants' possession was sufficient to support the lien. As to proof under the commission, it not being a matter in difference between the parties, the arbitrator had no right to decide on it; but it was prudent in him to include it as he has done, because had he in our opinion possessed that authority over it which we hold that he has not, the entire omission of it by him would have been a reason for setting aside the award altogether.

GURNEY B. concurred.

Rule absolute to set aside that part of the award which directed the proof under the bankrupt's estate, and to increase the damages by adding the value of the goods brought on the premises after the act of bankruptcy, and not supplied on the credit of or paid for by the defendants. As to the residue, rule discharged.

1834.

GUNN against M'CLINTOCK.

A defendant arrested on mesne process in special bail afterwards arrested in action on the judgment obtained in the first action: Held, that he was entitled to be discustody, though the special bail put in in Ireland had been discharged for a defect in the affidavit to hold to bail.

A defendant arrested on mesne process in Ireland put in special bail there, and was afterwards arrested in England in an action on the judgment obtained in the Irish court of Exchequer, he was arrest Kent in an action on that judgment.

THE defendant had been arrested in Ireland for amount of several bills of exchange, and process the several bills of exchange, and process amount of several bills of exchange, and process tering a common appearance, but on what ground not shown to the court on the affidavits used on shown to the court of Exchequer, he was arrest tering a common appearance, but on what ground not shown to the court on the affidavits used on shown to the court of Exchequer, he was arrest tering a common appearance, but on what ground not shown to the court on the affidavits used on shown to the court of Exchequer, he was arrest tering a common appearance, but on what ground not shown to the court on the affidavits used on shown action on the judgment obtained in the Irish court of Exchequer, he was arrest tering a common appearance, but on what ground not shown to the court on the affidavits used on shown action on the judgment obtained in the Irish court of Exchequer, he was arrest tering a common appearance, but on what ground not shown to the court on the affidavits used on shown action on the judgment obtained arrest tering a common appearance, but on what ground not shown to the court on the affidavits used on shown action on the judgment obtained in the Irish court of Exchequer, he was arrest tering a common appearance.

Mellor moved to discharge him out of custo to be discharged out of filing common bail, on the ground that he had custody, though the special bail put in in Ireland had been discharged for a defect in the affidavit to hold to bail.

Mellor moved to discharge him out of custo custody, the ground that he had arrested twice for the same cause of action, an after being arrested in the original action, he cou mentioned a case of Sydney v. O'Gorman Mah which the defendant being arrested in an action broadle J. A rule having been granted,

G. Henderson for the plaintiff showed cause. less it is clearly shown that the plaintiff has the security for his demand in the county where the arrest took place, with equal advantages in prose his suit there, which he has here, the rule nemo bis vexari pro eadem causa does not apply. In v. Murray (a) the defendant was arrested in An and judgment had been obtained against him. On his being again arrested here for the same de the court refused to discharge him, adopting the ring of counsel, that the court would not take notice arrest in a foreign country, and that it would be

(a) 1 T. R. 470; see Tidd, 9th ed. 176.

to deprive the plaintiffs of what was perhaps their only security for the payment of their debt. In Imlay v. Ellefsen (a) the plaintiff held the defendant to bail for the same cause of action for which he had been previously arrested in Norway, and as it did not distinctly appear to the court that the plaintiff had the security of bail there, so as to have the same benefit of prosecuting his suit there as here, the court refused to take from the plaintiff the benefit he was entitled to by the laws of this country. In Naylor v. Eagar (b), though an attachment had issued against the defendant's goods in New South Wales, still as it was not known whether bail were put in to the action, or whether the goods &c. were rendered in execution to the plaintiffs, the court refused to discharge the defendant, as it did not appear clearly that the plaintiffs had the same remedy in the colony as they might have here. Now here the plaintiff has not the same security of bail in Ireland, for they have been discharged.

GUNN v.
M'CLINTOOR.

Mellor in support of the rule. The practice of the Irish courts is well known, so that Imlay v. Ellefsen, where the court did not know whether by Norwegian law the plaintiff had the same benefit of bail which he had here, does not apply. Maule v. Murray may be disposed of by a like observation. The discharge of the bail in Ireland on entering a common appearance must be taken to have arisen from the plaintiff's laches, so that the authority of Bower v. Barnett (c) is untouched, which lays down that in an action of debt on a judgment, whether after verdict or by default, the defendant cannot be arrested, if he was arrested in the original action.

⁽a) 2 East, 453.

⁽b) 2 Y. & J. 90; see Wood v. Thompson, 5 Taunt. 851.

⁽c) Sayer's Rep. 160; Tidd's Prac. 9th ed. 177.

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I.

GUNN

O.

M'CLINTOCK.

Lord Lyndhurst C. B.—I am of opinion that defendant should be discharged on filing common of the security of bail in *Ireland* had continue defendant would not have been liable to a second here; and if, on account of the bail having been charged in *Ireland*, that security does not conthere, he ought not to be put in a different situal unless that discharge be shown by the plaintiff to taken place from no fault or laches of his own; a which may have influenced the *Irish* court as it have done this. However, the motion may stand at the plaintiff's expense, to ascertain that fac file an additional affidavit by to-morrow.

It afterwards appeared that the discharge of bail in *Ireland* had taken place for a defect if affidavit of debt.

Rule absol

Fyson against Kemp.

Semble, a motion to set aside a declaration and subsequent proceedings for irregularity, is too late if seven days in full terni have elapsed since the irregularity; and it is at all events too late after the plaintiff has taken another step by demanding a plea.

THE process was serviceable only. The decla was filed conditionally, and notice of such was given on 15th April, but the appearance wentered till the 16th. On the 18th the plaint manded a plea. On the 22d a rule was obtain Hoggins to set aside the declaration and subseproceedings for irregularity with costs. Caus shown that the application came too late, being week after the irregularity, and also after a step Richards supported the rule, on the ground that made within the time for pleading, which diexpire till the 23d.

IN THE FOURTH YEAR OF WILLIAM IV.

Lord LYNDHURST C. B.—Were this only a question of time, we think that the interval of seven days in full term is too long; but the defendant should at all events have applied before any other step was taken in the cause. however short the interval.

PARKE B.—It does not appear to me that seven days are that reasonable time within which the defendant is bound to apply; at all events he should have come before the next step.

Rule discharged.

CRESSWELL against CRISP.

EBT on a promissory note by payee against maker. Debt against Demurrer to the declaration.

N. G. Clarke moved on Reg. Gen. Hil. 4 Will. 4. in the margin No. 2. [this Vol. p. i.] to set aside the demurrer for that the note a frivolous statement in the margin of the matter of pressed to be law intended to be argued, and to be at liberty to sign "for value received:" Held, judgment. The statement objected to was, that the not so frivoaction being in debt, it did not appear that the note was warrant its expressed to be for "value received," nor any thing being set aside equivalent thereto, and that therefore debt would not irregular under orginales ou by the lie.

the maker of a promissory murrer stating on motion as Reg. Gen. Hil. 4 W. 4. No. 2.

R. V. Richards showed cause. In Bishop v. ·Young (a) the declaration was in debt by the payee against the maker of a note; and in Priddy v. Henbrey (b), the same form of action was adopted by a to he forth guideaid of war of

(a) 2 Bos. & P. 78.

(b) 1 B. & Cr. 674.

992

CRESSWELL 9. CRISP.

drawer of a bill against the acceptor, and in both the declarations were upheld only on the groun the note and bill were stated to have been giv "value received."

N. G. Clarke contrà. In White v. Ledwich declaration on a bill was demurred to because not stated to have been given for value receive the court held it unnecessary, and the judgmen for the plaintiff. The new forms of declaratio bills and notes promulgated in Trinity term 1 W do not contain the words "value received."

Lord Lyndhurst C. B.—The plaintiff may preither in assumpsit, to which action the precementioned apply, or in debt. If he elect the form of action he must pursue the terms of an ord declaration in it. The general rule (b), which we tended to prevent a declaration in debt on a bill of from exceeding in length the forms given by the schannexed, relates only to costs. The cases cited that the matter of law raised is certainly not so frivate to warrant us in setting aside this demurrer.

PARKE B.—We ought not to determine this on motion.

Rule discharg

⁽a) K. B. Hil. 25 G. S. Bayley on Bills, 4th ed. 34. notis. It d appear whether the action was in debt; Macleod v. Sace, Lord 1481, there cited as S. P. was in assumpsit.

⁽b) Trinity 1 W. 4. Vol. I. 525.

WALKINSHAW against MARSHALL and Another.

THE defendants in this and two other actions by the Where a plainsame plaintiff, obtained two orders for a week's tiff becomes time to plead on the usual terms, and delivered their fore the trial pleas on 28th November. On 26th November their of a cause, the attorney offered the plaintiff 50 per cent. on the debt, not apply for and on 7th December the plaintiff offered to take 75 security for per cent. On the 10th January the plaintiff was has ascergazetted a bankrupt; on the 29th the issue was deli-the assignees vered; and on the 31st, the last day of Hilary term, have resolved

Coleridge Serit. showed for cause, first, that the time time to go to to plead obtained by the defendant had prevented the trial at the plaintiff from trying his cause before the bankruptcy, Michaelmas and also that the motion came too late on the 31st term, had not January, after the bankruptcy had been gazetted on time to plead the 10th.

for costs from the assignees (a).

Per Curiam (b).—The ground for this application terms" were was the change of the plaintiff's circumstances during interalia the the progress of the cause, and the question is, whether accepting short the defendants have come too late after they had in- the plaintiff. telligence of that change? One of the "usual terms" might still imposed on giving time to plead is, that the defendant trial at the shall take short notice of trial, and if the plaintiff had sittings after that term, but been active he might have gone to trial at the sittings did not. On the He does not do so, and he appeared in after Michaelmas term. becomes bankrupt before he can go to trial.

costs from the assignees, made on the 31st January, was in time.

bankrupt bedefendant cancosts till he tained that to proceed Maule for the defendants obtained a rule for security with the action.

.1834.

A plaintiff declared in sittings in two orders for been obtained. As the " usual notice of trial, have gone to 10th January The the Gazette as a bankrupt, Held, that an application for security for

⁽a) See 7 T. R. 296. 3 M. & Sel. 283. 6 Taunt. 123. 1 Marsh. 4. and and on the 29th the issue 477. 4 D. & R. 81. 2 B. & Cr. 579. 2 D. & R. 423. 2 Taunt. 62. 2 Chit. R. was delivered: 150, 359; Mason v. Polhill, (E. 1833.) ante, Vol. III. 595.

⁽b) Lord Lyndhurst C. B., Parke, Bolland, Alderson, Bs.

1834.

Walkinshaw 70. MARSHALL and Another.

simple fact of his becoming bankrupt does not en the defendants to security for costs, for the first ment at which they can apply for such security is a ascertaining that the assignees have resolved to go with the action. The assignees might put a stop the action if the bankrupt proceeded with it, but for their benefit.

Rule absolute

PYBUS against BRYANT.

The writ of summons was against Andrews Bryan in " an action on promises, and the defendant's name was similarly spelt in the distringas; but in the copy of the writ of summons served on the defendant the name of Andrews was stated to be Andrew: distringes must stand, for the service of the copy was not made in pursuance of 2 W. 4. c. 39., but according to

the court:

Rule had been obtained by Dunbar to set asid writ of distringas and subsequent proceedi and calling on the plaintiff to pay back 21. paid ur the distringas, on the ground that a true copy of writ had not been served. The writ stated the defe ant's name to be Andrews Bryan, the copy has Andrew Bryan. Erle was about to show cause for plaintiff but was stopped by the court, who asked v the irregularity was? It was answered that the n on the copy was not identical or idem sonans, and 2 Will. 4. c. 39. was not complied with.

PARKE B.—The writ of summons and the district Held, that the both stated the defendant's name correctly. of the writ of summons which was served gave defendant all the information which he could requ and could not mislead him. Service of such a c was sufficient for the purposes of obtaining a distrin The service of the copy was not made under sec the practice of of 2 Will. 4. c. 39., which directs the copy of a ca

Held, also, that the distringas being "in a plea of trespass on the case on promises," will m set aside, though the writ of summons was "in an action on promises.

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ta: be delivered to a party, but according to the practice of the court relating to serviceable process.

1884. PYBUS. BRYANT.

ALDERSON B.—The practice of the court is, to leave a copy of a writ of summons at the defendant's residence. Now it is one thing not to comply with the practice, and another to do a thing contrary to the act.

It being urged that the writ of summons was "in an action on promises," and the distringas "in a plea of trespass on the case on promises," the court refused to entertain the objection, the respective forms in the schedule of 2 Will. 4. c. 39. having been followed, and discharged the rule with costs.

PRIMROSE against BRADLEY.

Charles and Charles and Charles

THE plaintiff, a London attorney, sent a writ in a The plaintiff, letter by post to Paine, an attorney at Dover, who a London attorney, sent a was deputy constable (or bodar) of Dover castle, with writ in a letter directions to get the same executed. The master to a Dover allowed him on taxation 4s. for the warrant, and 6s. 8d. was also defor attending for it and instructing the officer. Man-ble or bodar sel obtained a rule to review the taxation, and return of Dover case. the money, on the ground that the charges allowed get it exeexceeded those given by 23 H. 6. c. 9., and also that cuted, and Paine acted as under-sheriff.

Channell showed cause. It is not clear that Paine having allowis an "officer" within 23 H. 6. c. 9.; but at all events ed 4s. for the warrant, and his charges are not made in that character, but as 6s. 8d. for atspecial agent of the plaintiff, so that they are not only it and instructto execute it, the Court affirmed the taxation, though the fees were above those allowed by 23 H. 6. c. 9.

tle, in order to after**ward**s taxed the bill of the latter. The master ing the officer PRIMROSE v.
BRADLEY.

recoverable by action, but being those usually and allowed on taxation, were properly allow Paine in this case. Townsend v. Carpenter (a) Foster v. Blakelock (b).

Mansel contrà, relied on Dew v. Parsons (c).

Lord Lyndhurst C. B.—That was a simple A sheriff claimed as of right a larger fee for his and labour on a warrant issued by him in the e tion of his office, in a cause in which the defendan attorney, than he was entitled to by 23 H. 6. c. 9. the court held that the defendant might maints action for the overplus as for money had and receive might set it off in an action against him by the sh But to bring the sheriff or his officer within the there must not be imposed on him any other c beyond those to which he is liable in his official This plaintiff has by his own acts, in the of delivering the warrant, taken this officer out of strict letter of the statute, whilst by taxing his bi recognized him as his agent, and not as an officer The rule, therefore, should be discharged, and plaintiff left to any other remedy he may have u 23 H. 6.

PARKE B.—The process was sent to Paine letter, so that besides the postage, which may been separately allowed, he had the trouble of res it and acting on its instructions. If the charges made by Paine as an officer of the constable of D castle, we cannot deal with it by taxing it as an a ney's bill, according to this motion.

⁽a) 1 Ryl. & M 314, 1825.

⁽b) 5 B. & Cr. 328, (1826.

⁽c) 2 B. & Ald. 562, (1819.)

ALDERSON B.—We were called on to review this taxation, on the ground that it was the bill, not of an attorney, but of a sheriff's officer. Were that so in fact, we could not deal with it, nor could it have been referred to taxation except as an attorney's bill. Paine is in the first instance treated as an agent, and it is then sought to turn round and treat him as an officer within 23 H. 6.

1834. PRIMROSE v. BRADLEY.

Rule discharged with costs.

WILSON and Another against KING.

THIS cause had been referred to a barrister to make Where a cause his certificate. He certified that a verdict should is referred to a barrister with be entered for the plaintiffs for a sum named. Hum- power to cerfrey obtained a rule to set aside the certificate and certificate canverdict as being against law. He sought to distinguish not be set a certificate from an award, on the ground that the ground that arbitrator cannot state facts for the opinion of the court on the former; contending that objections might therefore betaken to one, which could not be available against arbitrator, having only such the other.

Whitehurst in support of the certificate showed cause. ficate a writ-One ground of this motion is, that an unstamped ten paper paper offered in evidence was rejected by the arbitra- proved before tor. [Alderson B. Is that an objection to the award?] raise a ques-

PARKE B.—I consider it to have been long ago set- the court? tled by the case of Campbell v. Twemlow (a), that the parties who submit to the award of an arbitrator are bound by his opinion, both as to law and fact (b). No

(b) S. P. Perriman v. Steggall, 9 Bing. 681. (a) 1 Price, 81.

tify only, his aside on the he has mistaken the law.

Quære, if an limited power, may deliver in with his certistating facts him, so as to tion of law for the opinion of

WILSON and Another v. King.

objection appears on the face of this certificate the limited power of such an arbitrator prevents from stating a point of law as he could have done, the reference empowered him to make an award, only proves that the parties have themselves sel a mode of reference which may or may not be lial that inconvenience.

BOLLAND B. concurred.

ALDERSON B.—In Holmes v. Higgins (a), the trator delivered a written paper with his award, in a to raise a point of law for the opinion of the court the court set aside the award upon the facts state that paper.

GURNEY B. concurred.

Rule discharged with costs (May 1.)

- (a) 1 B. & Cr. 81. It probably was not one of the terms of that ence that the arbitrator should be at liberty to state facts in his aw the opinion of the court in point of law.
- (b) In Wade v. Mulpas, which was heard on May 6, and which a reference similar in its circumstances, Godson had obtained a rule, on the ground of the arbitrator, a barrister, having made an against law and fact.

Tulfourd Serjt. and Greaves showed cause.

Godson used the same argument against the certificate as in the last The Court alluded to Campbell v. Twemlow, and having mentioner late decision in Wilson v. King, discharged the rule with costs; Alder adding, that the court in Wilson v. King held the certificate to be full purpose an award; and that had the arbitrator wished for the opinion court, he might have stated the facts, is order to obtain it.

consider a traction of this equilibrium and standard and done for the Postan against Masser.

A SSUMPSIT. The declaration was framed before The London the new rules of Hil. 1834, and contained special court of requests acts tounts for not delivering goods according to agreement, conterjurisdicfor not accounting for goods sold, and for not returning dated degoods unsold. The plaintiff had a general verdict, mands, subject to a reference to a barrister, who certified are special generally, that a verdict should be entered for the counts; but not in cases plaintiff for 51., without restraining the verdict to any where unliquiparticular count: Petersdorff obtained a rule to enter dated damages are sought to a suggestion on the London court of requests act, be recovered; 89 & 40 G. S. c. civ. in order to deprive the plaintiff count for not of costs, or to stay proceedings on payment of 51.

tion over liquithough there returning goods unsold.

Bompas showed for cause that the acts 3 J. 1. c. 15., 14 G. 2. c. 10., and 39 & 40 G. 3. c. civ, applied only to suits for debts not exceeding 5l., and not to actions of special assumpsit for unliquidated damages. Jonas v. Greening (a).

Petersdorff in support of the rule. The argument on the other side would confine the jurisdiction of the London court of requests to indebitatus assumpsit. But nothing in the acts excludes from their beneficial operation, actions where special counts are used. Were it otherwise, actions on bills would be excluded. In Sandby v. Miller (b), it was held that these acts applied where the plaintiff recovered less than 51. on a count in assumpsit on a quantum valebant. Here the counts, though special in form, amount to little more than the common count for the value of goods. Jonas v. Greening was an action on the case for non-delivery

⁽a) 5 T. R. 529, and see Tidd, 9 ed. 954. (b) 5 East, 194.

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CASES IN EASTER AND TRINITY TERM

Postan v.
Masser.

of goods according to a contract, and not to rec the value of the goods. The damage which the accrued from non-performance of the contract medepended on an uncertain event. So here the mence showed the subject-matter of suit was rather of arithmetical calculation, than of uncertain damages.



PARKE B. (2 May.)—I think that the jurisdictic the London court of requests is not confined to ac of debt or indebitatus assumpsit, but extends to I dated demands. In this case the count for not counting for goods sold, might be such a liquid demand. But there is also a count for not retur goods unsold, which cannot be so considered. As arbitrator has certified that a verdict should be ent generally for the plaintiff, it must be taken part of the damages was given on that coun well as the others. Had the defendant procured arbitrator to confine his award to those count which the demand was liquidated, the result n have been different.

The other Barons concurring,

Rule discharged, the costs to be in the cause.

GRANGE against SHOPPEE.

Motions for new trials after writs of trial under a writ of trial, pursuant to 3 & 4 Will. 4. c. 42. s. 17., should be made on an affidavit, ver the notes of the presiding judge annexed thereto, to be his notes, without faffidavits.

c. 42. s. 17., the defendant had a verdict, which Thesiger now moved to set aside, and to enter a verdict for the plaintiff for 51. or for a new trial. secondary had given leave to move to enter a verdict, and gave his certificate to delay execution till the plaintiff could apply to the court. Affidavits of what took place at the trial were produced, as were also the secondary's notes, but the latter were not verified by affidavit.

1834. GRANGE v. SHOPPEE.

Lord Lyndhurst C. B. (April 16.)—The judges yesterday settled that applications of this kind, consequent on trials before sheriffs and other officers, under writs of trial, should be made on producing the notes of the presiding judge, verified by affidavit to be his. The counsel may move; but the rule, if granted, must not be drawn up till the secondary's notes are thus-The case may then come on as a motion, without being put into the new trial paper.

A rule having been granted, was drawn up after the notes had been verified by affidavit.

See Mansfield v. Brearey, 1 Adol. & Ell. R. 347.

Hellings, Administrator, against Stevens.

PUSBY had obtained a rule for a new trial after The affidavit the defendant had obtained a verdict on a trial verifying the before a secondary of London, on a writ of trial. officer had hesitated to draw it up, doubting whether under a writ the affidavit sufficiently authenticated the paper A. suant to 3 & 4 annexed to it, and purporting to be notes of the trial s. 17., need signed by the secondary, to be the notes of that officer. only state It was made by the managing clerk to the defendant's annexed conattorney, and stated that the paper writing thereto tains the notes annexed marked A., purporting to be a copy of the sheriff to the

The of a trial had of trial, pursent by the ...;

1834. HEILINGS T. STEVENS.

secondary's notes, taken on the said trial, was reci by the deponent from the said Mr. J. the secon who acknowledged that the signature I. J. to paper writing thereunto annexed, was his the said J.'s signature. It then proceeded to state tha deponent could not swear that such paper writing true copy of the notes so taken on the trial, behis objections made at the trial were not stated &

Lord Lyndhurst C. B. (23 April.)—The rule be drawn up, for the first part of the affidavit is cient, and the latter part is merely surplusage. party was not bound to swear that the copy o notes received from the secondary was a correct of those taken by him at the trial, but merely tha paper annexed contained the notes transmitted by to this court.

Rule drawn up accordingly (

(a) See ante, 270.

Fowler against Hendon.

If a notice of dishonour is sent by post on the day on which the party ought to receive it, the onus is on the vendor to prove affirmatively, that the in in time to reach the party that day according to the course of the post.

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A SSUMPSIT on a bill of exchange, by ind against indorser. At the trial at the sitting Easter term, it appeared that the notice of non-pay of the billought to have been given on the 7th Nove by the plaintiff to the defendant, both residing w the limits of the twopenny post. The plaintiff proletter containing the notice to have been put it letter was put twopenny post office by daylight on that day, within office hours, which ended at six o'clock. judge left it to the jury to say whether there wa reasonable evidence that the notice came to the fendant's hands on the 7th. The plaintiff had a

diet on a plea of the statute of limitations. Mansel moved for a new trial, and cited Smith v. Hallett (a). Lord Lyndhurst C. B. The plaintiff should have proved that the notice was put in at such an office hour, that in the ordinary course of the post a letter would reach the address on the 7th.] A rule having been granted,

Fowler HENDON.

Chilton showed cause.

PARKE B. (12 June.)—We think there must be a new trial, and that the learned judge's direction was wrong. The plaintiff was bound to prove the letter to have been put in in time to have been delivered the same night. No evidence was given of the course of the post, or where the letter was put in. Had it been put in in the general twopenny-post office, it might have been put in in time; but if elsewhere, the contrary. The burthen of that affirmative proof was on the plaintiff. The other barons concurring,

Rule absolute.

(a) 2 Campb. 208.

HEWITT against W. MELTON.

ASE. The first count stated, for that whereas The attorney the plaintiff heretofore &c., before the barons of for a defendant who was in custody on

final process, obtained the consent of the plaintiff's attorney not to charge him in execution in the term in which that step ought to have been taken, on the false representation that he had the defendant's authority and consent to take no advantage of his not being charged in execution till the next term. The defendant's attorney signed an andertaking to that effect, which, however, did not state that the proceedings were stayed at the defendant's request, pursuant to Reg. Gen. of this court, Hil. 25 & 27 G. 2. The defendant was not charged in execution till the next term, and was afterwards discharged on the ground of the above omission in the undertaking. An action having been brought by the plaintiff against the defendant's attorney for damages accraing from the defendant's discharge by the false representation of the defendant, it was held that it could not be maintained, for the damage laid arose from the informality of the undertaking.

1004

LEWITT U. MELTON.

his majesty's Exphequer at Westminster, in a cortain action then depending in the said court at the suit (the plaintiff against one T. B. Molton, secovere against the said T. R. M. a judgment for a certain of money, to wit, the sum of 1900/. for damages as costs, as by the said judgment recovered in the sai court of our said lord the king before the barons &c. ma fully appears, and which said judgment, before and the time of committing the grievances by the defenda hereinafter next mentioned, was and still is in full for &c.: And whereas, after the recovering the judgmen aforesaid, and whilst the same was in full force &c., 1 wit, on &c., in Mickaelmas term in the third year & the said T. B. M. was rendered to the custody of the warden of his majesty's prison of the Fleet, in discharg of his bail at the suit of the plaintiff in the said suit i the said court of Exchequer, and at the time of cour mitting the grievances by the defendant in this suit, hereinafter next mentioned, was a prisoner in the cu tody of the said warden of his majesty's prison of th Fleet, at the suit of the plaintiff in the said suit in thi said court of Exchequer, and the said T.B. M. havin been so rendered to and so being a prisoner in the cu tody of the said warden of his majesty's prison of th Fleet aforesaid, it became and was essential and ne cessary, by and according to the course and practic of his majesty's said court of Exchequer, for the plain tiff to cause the said T. B. M. to be duly charged upo the said judgment before the expiration of a certain time, to wit, before the end and expiration of Hiler term then next ensuing, to wit, Hilary term in the thin year aforesaid, and the plaintiff by R. H. who was the and there his attorney in the said suit in the sain court of Exchequer, was minded and desirous and was about so to duly charge, and but for false, fraudules and deceitful representations of the said defendant

inhereinafter mentioned, would have so duly charged the said T. B. M. in execution at the suit of him the plainitiff upon the said judgment; of all which premises the said defendant, before the committing the grievances hereinafter next mentioned, had notice: And whereas :afterwards after the recovering of the said judgment. and whilst the same was in full force, and after the said :FiB: M. had been so rendered to and whilst he was a prisoner in the custody of the said warden of his said majesty's prison of the Fleet as aforesaid, and whilst the plaintiff was so about to charge the said T.B. M. in execution of the said judgment, and before the expiration of the necessary time for so doing, and before the expiration of the said Hilary term in the third year aforesaid, to wit, on the 25th January 1833, the said 25th January 1883 aforesaid then and there being a daysin and before the end and expiration of the said Hilary term in the third year aforesaid, the said defeedant then being one of the attornies of his said majesty's court of Exchequer, and also the attorney of and for the said T. B. M. in the said suit, applied to and requested the said R. H. as being the attorney of and for him the said J. Hewitt the plaintiff in the said suit, and also the plaintiff in this suit, for the said J. Hewitt not to charge, and that he would not charge the said T. B. M. in execution in the said then Hilary term in the third year aforesaid, nor until the then next Easter terms: and the plaintiff further says, that the said defendant contriving and fraudulently wickedly and deceitfully intending to deprive the plaintiff of the benefit and fruits of his said judgment against the said T. B. M. and the means of recovering and enforcing the payment of the said damages and costs so recovered by the

Hewitz b. Metron.

plaintiff against the said T. B. M. by the said judgment

Hewitt v. Melton.

1834.

fully represented, pretended and asserted to the R. H., so then and there being the attorney of an the plaintiff in the said suit in which the plaintif so recovered the said judgment as aforesaid, and he the said defendant was then and there autho by the said T. B. M. to make such application an quest to the said R. H., so then and there being a ney of and for the plaintiff in the said last-menti suit, and that he the said W. M. was then and authorized by the said T. B. M. to sign and deliv the said R. II. so then and there being attorney of for the plaintiff in the said last-mentioned suit, a tain undertaking in writing, then and there signed delivered by the said defendant as the attorney of for the said T. B. M. in the said last-mentioned s the said R. H. as attorney of and for the plain the said last-mentioned suit, whereby he the said l so being attorney of and for the said T. B. M. it said suit, consented that the plaintiff should have the then next Easter term to charge the said T. 1 in execution at the suit of the plaintiff upon the last-mentioned judgment, and to take no advanta his the said T. B. M. not being charged in the Hilary term, it being then and there agreed that said plaintiff should have until the then next I term to do it in, meaning to charge the said T. B. execution upon the said judgment; and the pla further says, that thereupon the said R. H. so and there being the attorney of and for the plaint

Hilary term, it being then and there agreed the said plaintiff should have until the then next I term to do it in, meaning to charge the said T. B. execution upon the said judgment; and the plafurther says, that thereupon the said R. H. so and there being the attorney of and for the plaint the said suit, confiding in the said assertions and r sentations of the said W. M., and believing the to be true, and not knowing to the contrary the did then and there take and accept the said co and undertaking in writing, and did forbear and

Hewitt 6.

to charge the said T. B. M. in execution at the suit of the plaintiff upon the said judgment, on or before the end, or expiration of the said Hilary term in the third Bear aforesaid, or within a due and proper time in that hehalf, as he could and might and otherwise would have done, whereas in truth and in fact the said T. B. M. was not at the time he made such application and request as aforesaid to the said R. H. so being the attorney of and for the said plaintiff in the said suit, and made such assertions and representations to the said R_iH_{ij} or afterwards, authorized or empowered by the said T. B. M. to make such request and application: And whereas in truth and in fact the said W. M. mas not, at the time he so signed and delivered to the said R. H. so being attorney of and for the plaintiff in the said suit as aforesaid, the waid undertaking or coment in writing an aforesaid, and made such assertion and representation in that behalf as aforesaid, or sherwards, authorized or empowered by the said T. B. M. to sign or deliver the same to the said R. H. so being the attorney of and for the plaintiff in the suit aforesaid, or to the plaintiff in the suit aforesaid, or to give any other valid or sufficient undertaking for the plaintiff to have until the said then next Easter term to charge the said T. B. M. in execution upon the said judgment, and to take no advantage of the said T.B. M. not being charged in execution the said then Hilary term: And the plaintiff further says, that the said F. B. M. took advantage of the plaintiff not having charged or caused him the said T. B. M. to be charged in execution upon the said judgment before the end and expiration of the said Hilary term, and afterwards, to wit, on the 17th of April in Easter term, in the third year aforesaid, made, and caused to be made, application to the said court of Exchequer to be discharged out of custody at the suit of the plaintiff in HEWITT v.
MELTON.

1834.

the said suit, for and by reason of the said plaint the said suit not having charged, or caused t charged, him the said T. B. M., in execution upor said judgment, before the end and expiration of said then last Hilary term, as according to the ca and practice of the said court he ought to have and the said T. B. M. was, upon and in consequ of such application, afterwards, to wit, on the 2 May in the same Easter term, in the third year afore by and in pursuance of a certain rule or order o said court, made in the said court on 2d Ma Easter term, in the third year aforesaid, discha out of custody of the said warden of the Fleet a suit of the plaintiff, not having charged, or caus be charged, the said T. B. M. in execution upon said judgment within the said time in that b aforesaid, and which the said R. H. so being a ney of and for the plaintiff in the said suit, for and omitted to do, by, from, and in consequence c said false, fraudulent and deceitful representation assertions of the said defendant, and the belief confidence of him the said R. H. in the same, at means of the premises the plaintiff lost all benefit advantage of and from the said judgment so recon by him against the said T. B. M. as aforesaid, and means of obtaining or recovering payment or sat tion for the damages and costs aforesaid, or any thereof, to wit, in the county aforesaid. The ge issue was pleaded before the rules of Hil. 4 W. 4. into operation.

At the trial at the Middlesex sittings in Trinity 1834, it appeared that the defendant acted as the torney of T. B. Melton, his father, who was imprisin the Fleet on final process at suit of the plane.

1884. Hewitt v. Malton.

and would have been supersedable if not charged in execution in Hilary term 1833 (a). On the 25th January, the defendant being at the office of the plaintiff's attorney, saw there a habeas corpus which had been got ready in order to bring up T. B. Melton to be so charged. Defendant told the plaintiff's attorney that that course would expose his father and bring in detainers, and begged that he would not charge him till Easter term. The plaintiff's attorney agreed to do so, if he could procure his father's consent not to take any advantage on that account. The defendant then left the office, as he said, to see his father on the subject. He afterwards returned there, representing that he had his father's consent and authority, and immediately. before quitting the office, wrote out the following memorandum and consent: - " Exchequer of Pleas, Hewitt v. Melton. I hereby consent that the plaintiff shall have till next term to charge the defendant in execution, and to take no advantage of his not being charged in execution this term, it being agreed that the plaintiff shall have until next Easter term to do it in. W. Melton, defendant's attorney. January 25, 1833." T. B. M. was not charged in execution in Hilary term. but afterwards applied to a judge at chambers for his discharge. The case was adjourned for the consideration of the court, who, in Easter term 1833, discharged the prisoner, on the ground that the above consent did not state that proceedings were stayed at the request of the defendant in the suit, according to Reg. Gen. of this court, Hil. 26 & 27 Geo. 2. s. 11. [ante, Vol. I. App. No. I. p. xiv.] (b). The affidavits in sup-

⁽a) See as to the proper time for charging a defendant in execution in the Exchequer, Reg. Trin. 26 & 27 Geo. 2. s. 11., ante, Vol. I. Appendix, No. I. p. xiv.; and in K. B. Reg. Hil. 26 & 27 Geo. 3.; Tidd, 9 ed. 360, 367; 2 Archb. K. B. Prac. 124.

⁽b) See the case reported, ante, Vol. III. p. 503.

HEWITT v.
MELTON.

1834.

port of that discharge stated that T. B. Melton father, did not know of the undertaking given by son, and had never given him authority to enter in It was objected at the trial that the injury comple of arose from the defect in the undertaking, and from the false representation which was stated it declaration to have been made by the defend Vaughan B. reserved the point. The plaintiff haverdict, and the court afterwards granted a rule nonauit or new trial.

Merewether Serjt. and Platt showed cause. ground of the discharge of T. B. Melton was, the was not charged in execution in Hilary term i Now the reason that he was not so charged was false representation of the defendant that he had prisoner's consent and authority that such chargin execution should be postponed to the next term. derson B. He would have been equally entitled to discharge under the general rule, and the plai would have been in the same situation if the defenda statement, that his father had given his consent to w that right, was true.] The plaintiff's attorney su that he should have charged T. B. Melton, had it been for the false representation of the defend That misrepresentation then, and not the incorrect of the undertaking, occasioned the loss of the b [Lord Lyndhurst C. B. The plaintiff's attorney s in substance, that he should never have accepted undertaking, correct or incorrect, had he not h satisfied by the defendant's representation that T Melton had given him authority to consent. other hand it may be urged, that as the undertal given was informal, the plaintiff's attorney was in same situation as if T. B. Melton had given the fendant the requisite authority. The validity or

TOTAL

reserve of that document is not here in question; the damage was, the loss of the body. That was occasioned by the defendant's deceit, and would have equally happened had the undertaking been correct in form, for I. B. Melton would still have taken the same advantage, relying on the absence of his authority to the defendant to consent to the postponement in question. Lord Lyndhurst C. B. If the attorney's representation bound his principal, was it not immaterial to the plaintiff's attorney whether that representation was true or false? And if so, then the injury arose not from the falsehood of the representation, but from the informality of the document in not stating on the face of it, that the proceedings were staid at the request of T. B. Melton the defendant in the suit, according to the rule of this court. The misrepresentation appears to have been made as to a fact wholly immaterial; and if so, how can this action be maintained 2 The decision of Hewitt v. T. B. Melton (a), the father of this defendant, proceeded on the ground of the legal insufficiency of the undertaking.] That insufficiency followed up by fraudulent misrepresentation.

HEWITT O. MELTON.

Follett and Miller, in support of the rule, were stopped by the court.

Lord Lyndhurst C. B. (23d May.)—This being an action brought to recover damages laid to have been occasioned by the act of the defendant, it is necessary that the plaintiff should maintain it by showing that they arose from the cause stated in the declaration, vis. the false representation of the defendant. Now as the defendant was attorney to his father in the former action, his act in giving the consent in question would have equally

(a) And, Vol. 111. p. 803.

1012

HEWITT T.
MELTOK.

bound his client, whether or not he had his fathe press authority, for that specific step (a). The d to the plaintiff has arisen not from the want of Melton's authority to his attorney, but from t formality of the undertaking. That documer prepared by the defendant in the office and in the sence of the plaintiff's attorney, who was as n party to the omission in it as the defendant.

Bolland B.—I am of the same opinion. been contended that the damage, viz. the loss security of T. B. Melton's body, arose from the representation by the defendant, that his fatheauthorized the consent in question. But some further was necessary to be done, for a document have been properly prepared according to the court. That was not done; then the informathe document was the ground of the discharge the question whether or not the authority had in fact given, as represented, was immaterial.

ALDERSON B.—The gist of this action is, that to a false representation of the defendant, dama; sustained by the plaintiff. Now that damage, consisted in the discharge of T. B. Melton, d arise from the false representation laid in the ration, but on the ground of a defect in the doc itself.

GURNEY B.—I concur in opinion, though w gret, as the case appears to be one in which frau been practised.

Rule absolute for a non!

(a) See 1 Salk. 86. Carth. 412. Skinn. 679. Comb. 439.

DIXON against NUTTALL.

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A SSUMPSIT by payee against the maker of the where a promissory note missory note was made payable to D. or bearer on

demand at sight, it was held that the latter words could not be rejected, and

It was averred that the defendant had sight. At the trial at the sittings in Hilary term no presentment of the note was proved, nor did it appear that the ing presentment of the note was proved, nor did it appear that the defendant ever saw it after it was made. For the defendant, it was objected that the instrument was not a promissory note; but Bolland B. held that the words "by given up clothes and papers" meant for value received; and the court afterwards assented to his opinion by refusing a rule for a new trial on that point. The plaintiff had a verdict on the note, subject to leave to move for a nonsuit on the ground of defect of evidence. A rule having been obtained accordingly.

Milner showed cause. This instrument is in truth not a promissory note payable at sight, but on demand only, and the words "at sight" should be struck out as inconsistent with its general tenor. The question therefore whether three days grace was allowable on such an instrument being expressed to be payable at sight (a), does not arise; but if it was, the days began to run from the making, and more than that time has elapsed between the making the note and the bringing



Where a promissory note was made payable to D. or bearer on demand at sight, it was held that the latter words could not be rejected, and that no action could be maintained without proves ing presentment for sight.

⁽a) See Chitty on Bills, 5th ed. 344; Bayley on Bills, 4th ed. 198, n. (52).

Dixon
v.
Nuttall.

this action. If sight was necessary, the defende it sufficiently when he made the note; and r sequent presentment for sight could be require the making of a note payable on demand pla maker in the same situation with the acceptor o and he becomes in effect an acceptor. Had th a bill drawn at or after sight, and accepted by party, the sight would appear in a legal way acceptance (a), and it need not have been after presented for sight in order to maintain an against the drawer. Then no presentment for was necessary. In the case of bank post-bills, tl pays at the day without days of grace; Love Securities, 247. [Parke B. Assuming that to] it does not help the plaintiff, for he does not sh there was any presentment for payment or fo If "sight" is to have any sense ascribed to it. not mean that the maker is to see the note be can be called on to pay it?] The sight was suff had when the note was signed, and no acceptan was requisite, for the law considers a promisso in the light of a bill drawn by a man on himse accepted at the time of drawing (b).

Bompas Serjt. supported the rule. The avin the declaration that the defendant had sight uproved. Now in Holmes v. Kerrison (c) it was that no debt accrues on a note payable after sight is presented for payment. That case shows tinction between the acceptance of a bill and the anote payable at or after sight. If the signs such a note was sight, as an acceptance is, it was immaterial whether it were made payable after s

⁽a) Campbell v. French, 6 T. R. 212.

⁽b) 2 Blu. Com. 470.

⁽c) ? Taunt. R. 32

after date, which cannot be contended. The words "on demand" might as well be rejected as "at sight."
The court here stopped him.

Dexon U.
NOTTALL

IIPARKE B. I take it to be a rule applicable to all instruments, that we ought not to reject words in any cose; where we can give them a meaning. Now the meaning of this note is clear thus far, viz that before the maker is to be called on to pay it, it must be presented for him to see it. That construction is not inconsistent with the other part of the note. The words "on demand" may have the effect of estopping the party from the benefit of the days of grace, but it is, unnecessary to determine whether they had that effect or not; for we cannot reject the words "at sight." Nor are those words synonymous with " after date," for Holmes v. Kerrison decides, that a bill payable at a certain number of days after sight, is not payable; till after presentment to the drawee. The meaning of this note clearly is, that the maker was not to be called on to pay till after sight. The rule therefore must be discharged.

Bolland B.—Holmes v. Kerrison ought to rule this case.

ALDERSON B.—It was argued that the sight of the maker at the time of his signing, was equivalent to the sight of the acceptor at the time of accepting, and therefore sufficient. That position was rested on the rule that a maker of a note is in the same situation as the acceptor of a bill, but that is a fallacy as applied to this question. Holmes v. Kerrison removed the only doubt I entertained.

GURNEY B. concurred.

Rule absolute.

the in support of the plea أبر فالعاصي dadw rated at aria mara di kacamatan

Knowies, Assignee of Wilson and HARMER, Sher of London, against STEVENS.

In debt on a bail-bond, it is not a sufficient defence to plead that no affidavit of debt was filed in the action against the principal, pursuant to 12 G. 1. c. 29.

s. 2. Semble, that to tion onthat act, whether the entire absence of such an affidavit is a defence to an action on a bail-hond, it should be pleaded that no such affidavit was made. The clude with a verification or to the country.

EBT. The declaration, was on a bail-bond in usual form (a). ... Plea, that before the suing ou the writ of capies, viz. against the principal in declaration mentioned, there was no infidevity of plaintiff's cause of action filed in this court, as requi by the statutes in such case made and previded; Special demurrar, stating for consequithat the mate pleaded in the said plea as to the sufficiency of affidavit of the plaintiff,'s cause of action, as requi raise the ques- by the statutes in such case to be made and filed this court, are matter of law for the decision of t court, and not for a jury, and should not be left t jury; and that the said: plea should have been fran so as to have referred the matters therein stated to court; and also for that the said plea consists altoget of matter of law; and; also for that the matter plant in the said plea by way of defence cannot be so plead and also that the plea hath no conclusion whate plea must con- either to the country or with a verification, and has proper conclusion. Joinder in demurrer. particular and the fathering of ٠.:

> Etle in support of the domurrer. There is no a clusion to the plea. (Stopped by the court.)

Variance between writ and declaration.

⁽a) The writ of capias was marked and indorsed for bail for 37L at of Francis Knowles against two defendants. The declaration was F. Knowles, (stating him to be assignee of Wilson and Harmer) and age one defendant only. The court refused to set aside the declaration motion; for though it gave the plaintiff a designation which did not app in the writ, it set up no incongruity between them; and as only a si defendant was sued, it only narrowed the effect of the process.

⁽b) See 2 Chitty on Pl. 4th ed. 447, n. b., and form of plea, vol. 3. 975

Mansel in support of the plea. First, the plea contains matter which is in substance an answer to the action. For the holding a defendant to bell without an affidavit of debt of the cause of action first made and filed, is contrary to 12 Geo. 1. c. 29 ss. I and 2 (a), though such affidavit need not be alleged in a declaration on a bail-bond (b). It is analogous to that pleaded by bail to an action on their recognizance that no ca, as was duly issued and prosecuted against the principal (c).

Then as to the form of the plea, the matter put in issue is of fact whether there was any affidavit. As the declaration does not set it out or refer to it as a substantive proposition, it was sufficient to deny it generally in the plea. Then the plea being merely nagative required no verification, Millner v. Crowdell (d); and the plaintiff should have replied that there was such an affidavit, setting it out in the replication with a prout patet per recordum and verification: Longe v. Eldred (e). Hume v. Liversedge (f) is no authority against this plea, for the plea there was, that no proper affidavit of the alleged cause of action was made and filed of record in the said court before the issuing the writ. That was held bad on demurrer, as not tendering a direct issue; but Bayley B. said, that the insufficiency of the affidavit might be objected to by setting it out with an allegation that there was no other. A prayer of judgment in a plea to the whole declaration is now irregular by Reg. Gen. Hil. 4 W. 4. No. 9.

1834 Knowles v. Stevens.

⁽a) He also cited 4 Ann. c. 16. s. 20., 7 & 8 Geo. 4. c. 71. s. 1., and 23 H. 6. c. 9.

⁽b) Nightingale v. Wilcozon, 10 B. & Cr. 202; 1 Saund. 296, notis.

⁽c) 3 Ch. on Pl. 4th ed. 995.

⁽d) 1 Show. R. 338.

⁽e) Ante, Vol. III. 234.

⁽f) Ante, Vol. III. 257.

1018

Knowles
v.
Stevens.

Lord LYNDHURST C. B. (May 28th.)—I am of opinion that this plea is bad, and no answer action. It was not sufficient to aver that there affidavit of debt filed; for then, supposing s affidavit to have been regularly sworn, a mere accineglect of the officer to file it might vitiate all the sequent proceedings. That could never be into on the other point it is clear that there ought been a conclusion to the plea; but we are not cat to give any opinion as to what does not appear record.

ALDERSON B.—The statute 12 Geo. 1. c. 2 enacts, that if after 24th June 1726, any writ or shall issue for the sum of 10l. or upwards, and davit shall be made as aforesaid, (omitting an which appears in the previous part of the section plaintiff shall not proceed to arrest the body, be proceed as in cases of causes of action not be Then the defendant should have averred that davit was made in order to raise the question act. The plea is also bad for want of a conclusi

Bolland and Gurney Bs. concurring,

Judgment for plai

STRUTT against Smith.

△ SSUMPSIT. Indebitatus count for goods sold. A sale of goods Plea: (before the new rules) non assumpsit. the trial at the London sittings after Michaelmas term, per cent. discount, bill it appeared that the plaintiffs, manufacturers at Derby, at three had dealt with the defendant on the sale of the goods months, 10 per cent. discount, in question, and on one or two former occasions, on cash in fourterms set out at the top of a printed invoice, con- The sellers taining a list of the various articles sold by the plain- considering tiffs, thus: "prices of cotton yarns &c., sold &c.— been induced 71 per cent. discount, bill at three months; 10 per by fraud to sell the goods cent. discount, cash in fourteen days." A list of to defendant, the prices was subjoined. The plaintiffs sought to bail for the show that the circumstances under which the defend- whole amount ant induced them to sell him the goods in question, fourteen days, amounted to fraud in him; it appeared that they there- and declared in indebitatus fore rescinded the contract, arrested him, and declared assumpsit for in indebitatus assumpsit within the fourteen days. goods sold. The jury The jury found that the defendant meant not to avail found that the himself of the 10 per cent. discount, but to take the not intend to longer credit. The plaintiffs had a verdict for the avail himself whole price of the goods sold; Gurney B. reserving count, but inleave to the defendant to move to enter a nonsuit, on tended to take the longer the ground that the action was prematurely brought, credit: Held, and to reduce the verdict by the amount of discount, if that the action being in form the court should think the action maintainable at all. ex-contractu, A rule having been accordingly obtained,

Busby showed cause. The verdict cannot be re-days; though duced after the finding of the jury, that the defendant trover might have been did not intend to avail himself of the discount. material point is, whether the action has been brought rescinding the too soon? Now the whole transaction in obtaining contract for fraud.

took place on At terms of "71 teen days." that they had held him to within the defendant did of the diswas prematurely brought within the fourteen The brought within

CASES IN EASTER AND TRINITY TERM!

SMITH.

the goods shortly before calling his creditors togeth was fraudulent as regarded the plaintiffs, and entit them to rescind the contract; but they might also s that the plaintiff had waived his right to credit, as t purchase by him was not bona fide at the time. Hogan v. Shee (a), Lord Kenyon said, that in the c of goods sold on credit, if it appeared that there h been any fraud on the part of the buyer, though t time of credit was not expired, he was of opinion 1 party might consider the credit as void, and proce immediately for the recovery of the money. So in Symons v. Minchwich (b), Eyre C. J. said, that if action be brought for goods sold within the ti limited for credit, it cannot legally be supported, unl it was not a bona fide purchase at the time by t vendee, for if he meant to impose on or defraud t vendor of his goods, the defence will not avail. Be the above cases were actions of indebitatus assump [Parke B. The plaintiffs' difficulty is, that if the meant to treat the case as one in which goods h been obtained from them by fraud, they should he brought trover. In Ferguson v. Carrington (c), it v held, that where goods are purchased on credit b person who is found to have fraudulently intended the time of the contract not to pay for them, I vendor cannot sue for goods sold before the cre expired, though he might have sued in trover imp diately. That case applies, if the contract was to t 10 per cent. short of the price stated, if cash was p at fourteen days, and 71 per cent. short of it if a at three months was given. The exact contract is clearly apparent, for it does not appear what cre was to be given if cash was not paid at the end

⁽b) 2 E.p. C. N. F. 150. (a) 2 Esp. C. N. P. 523. (e) 9 B. & Cr. 59.

fourteen days, and no bill was given. Gurney B. The contract seems to have been to take off 10 per cent. if cash were paid in fourteen days, and 7½ per cent. if paid by a bill at three months. The cases cited are dicta only.] Unless the court can see that there was a distinct contract for a precise and specified credit, the plaintiffs might sue immediately for the whole price.

STRUTT SMITH.

Bompas Serjt. and Kelly supported the rule. action was brought too soon, for this can in no sense be termed a ready-money transaction. It need not be contended, that if the defendant did not pay cash in fourteen days or give a bill, even if he had no option as to the further credit, he had at all events fourteen days; so that the plaintiffs could not sue before that period had expired. To a question from Parke B. they said that the contract for credit which existed when the goods were sold, might be thus stated in pleading:-that in consideration of the sale and delivery of the goods, the defendant undertook either to pay in cash in fourteen days, deducting 10 per cent. discount, or by a bill at three months, deducting discount at 71 per cent.; or if he did not pay in either of those modes, then to pay the whole immediately on failure to give the bill, or according to the course and usage of the trade, which would probably determine the credit. But whatever might have been the credit stipulated for, if the bill was not given, the defendant was clearly entitled to fourteen days to elect whether he would give cash or take the credit or not, and the plaintiff could not sue in form ex contractu till after that period had elapsed.

PARKE B. (26 May).—The evidence of defendant's fraud gave the plaintiffs no right to rescind the ex-

1092

STRUIT-T. SMITH.

press contract of saleron credit, and to substitute it another implied contract of sale for money to paid on request. It might possibly have entitled th to maintain strover, on the ground that ifraudil avoided the contract altogether; but in this form action they adopt the contract as such in all its ten and cannot be heard to say that it did not exist. A guson v. Carrington is a right decision on that suhje The question then is, what was the contract? is involved in some obscurity. The jury, hower have found that the defendant did not intend to a himself of the 10 per cent. discount, but of the opt to take the further credit. It is clear that during fourteen days he was not bound to pay on reque but had that interval in which to elect whether would pay cash at the end of it, or would pay b bill at three months, and the finding of the furly asc tains that he elected the latter. Then if he was a bound to pay for the goods at any price till after fourteen days had elepsed, this declaration, whi charges that the defendant was indebted to the pla tiff in a sum of money payable on request, is not su ported by the evidence given at the trial,

BOLLAND B. was at chambers.

ALDERSON B.—I am of the same opinion. T printed paper seems to have been an offer by t plaintiffs of terms on which they were disposed to d with the defendant, viz. either for cash at end of for teen days, or on the terms of his giving them a bill three months. Applying the facts of this case those terms, one of the alternatives is disposed of the bill was given, and we are not required to determ what would be the credit, if the cash was not pror the bill given; for as the jury have found in efficience of the bill given; for as the jury have found in efficience of the bill given; for as the jury have found in efficience of the bill given;

that it was in the defendant's option to take the further credit, that difficulty is disposed of. It is clear then, that as the plaintiffs have sued within the fourteen days, during which the defendant had a right to consider in what way he should exercise his option to pay in cash or to take the further credit, the action is premature, and the rule for a nonsuit must be made absolute.

1834. STRUTT 22. SMITH.

100 GURNEY B. concurred.

30 COUNTY 15

Rule absolute accordingly.

See Earl of Bristof v. Wilsmore, 1 B. & Cr. 514; Thompson v. Bond, 1 Camp. 4; Reud v. Hutchinson, 3 Camp. 351. aratio, to y

. MUDRY against NEWMAN and Another.

A Rule was obtained for judgment as in case of a non- On motion for suit for not proceeding to trial. It had been judgment as in enlarged for a term, in order to find the plaintiff's at- suit, it aptorney; he not having been found after diligent search peared that the by the plaintiff and defendants, the rule was served on been brought the plaintiff. In 1822, Pinero, an attorney, applied to to issue withthe plaintiff, a Frenchman, to lend his name to sue the out the plaindefendants; the plaintiff consented to be a witness, but ledge or authonever authorized the use of his name as plaintiff. rity, by an at-Pinero, however, brought the action in his name, and could not be issue was joined in it. The plaintiff was wholly ig- diligent search. norant that the action had been brought till the service The court orof this rule.

case of a nonaction had and carried on tiff's knowtorney who dered the rule to be served on the plaintiff

Beldam showed cause. The plaintiff should not be nimsen:—Held, on showburdened with the payment of costs, for, as in common ing cause, that cases, a party will not be prejudiced by the use of his the above circumstances

did not exonerate the plaintiff from liability to pay the costs, he having a remedy against the attorney; but the court enlarged the rule in order to find the attorney, and granted a rule calling on him to pay the defendant his costs.

1024

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1834.

MUDRY

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NEWMAN

and Another.

name without his authority, the misconduct of a ney in so using it will not vary the rule.

Davies v. Eyton (a) shows, that Pinero, the a is primarily liable to pay the costs to the defe The defendant was suffered to join the lesso plaintiff in that motion.

Per Curiam (31 May).—This is a case of hardship, for the plaintiff's only remedy seem against Pinero, for commencing the action with authority (b). In the case cited, the attorney out of the way, as in the present case. To should be enlarged in order to give opportunit plaintiff to find Pinero, and the plaintiff may raffidavits, and take a rule on them, calling on to pay the defendants their costs. Both ruthen come on together.

Rule enla

PROMOTIONS.

ON 7th July, Frederick Thesiger, Esq. of th Temple, was appointed King's Counsel, at their Davenport Hill, Esq. of Lincoln's Inn, repatent of precedence to rank after Mr. Thesign the same day William Erle, Esq. of the Inner was appointed King's Counsel. On 2d Augus well Cresswell, Esq. of the Inner Temple, a pointed King's Counsel.

⁽a) S B. & Ad. 785.

⁽b) See per Holt C. J. Anon. 1 Salk. 86; 1 Keb. 89. pi
Thomas v. Heues, ante, S38.

meatig and rest a

 $A_{ij} = a_i C_i$ Addenda of References to other Cases, Corrigenda, &c. **១**៥៥ 10 (025.0) 😅 [It is much desired that useful notices of this nature should be communi-, gated to the Editor for his better guidance and future revision of his reports.] Page 29, add to Dae v, Hare, "See Doe v. Davis, 1 Esp. C. N. P. 358. Lord Kenyon S. P. Secus, if judgment signed against the casual ejector, id. See 4 Taunt. 7. 1 Stark. C. N. P. 306. 1 Bos. & P. 205." 34 - 21, add to Guy v. Newson, "See 4 Bing. 209." \$4, add to Fisher v. Papanicplas, "See Husson v. Hutson, 7, T. B. Bligh and another v. Brewer, Exch. M. 1834." - 64, add to Watson v. Abbott, "See Hemming v. Samuel, 3 M. & S. Vort 818. Johnson v. Wells, 2 D. P. C. 352. Hill v. Salter, id. 980." - 68, add to Price v. Hurley, "See 1 Bing. New Cases, 5,7." ... 27, add to Walter v. Cubby, " See Jacobs v. Josephs, 2 Stark. C. N. P. 45, and Sparkes v. Spur, Chitty's Stamp Laws, 26. Stevens v. Lloyd, M. & M. 293." - 93, add after Rule discharged with costs, " It being part of the rule that indemnity should be given to the assignees." -111, add to Reid v. Lord Tenterden, "Sec Remnant v. Bremridge, 8 Taunt. 191. Nation v. Toser, post, 561. Tremeere v. Morrison, 1 Bing. N. C. 89., reported since the principal case was published." - 123, add after defendant in line 5., " Follett also urged that no actiou would lie for money had and received &c., for want of privity between the plaintiff and the Bank of England, citing Shue'v. Brittain, 4 B. & C. 375; but Bayley B. said, that in that case the money was paid to the defendants by a person having a right of control over it, and that the money paid in by the bankrupt in ", this cate was money had and received to the use of the assignees." 133, add to Owen v. Burnett, "See Harington v. Caswell, 6 C. & P. 352." 144, add to Doe v. Packer, "See 4 D. & R. 716. 9 B. & Cr. 760. Level Bed Barriog 2 B. & P. 23, n." -158, add "See Parry v. Gibson, 1 Adol. & Ell. R. 48." 165, line 18, after " clients (b)," add a]. - 270, add to Johnson v. Wills, "See Thomas v. Edwards, post." - 271, Hill v. Salt, line 3 from bottom, after "record" add "See s. 18." - 276, add to Braithwaite v. Montford, "Sec post, 450."

ADDENDA, &c.

1834.

Page 236, add to note (a), "See past, 765."

with the first writ."

- 308, line 3, of Nicholson v. Lamon, after January insert " wi continuance."
 add to marginal note " In cases where the writ is not it prevent the operation of the statute of limitations, the plaries may be sued out at any time, and the continuan necessary, entered as formerly, to connect the alias and
- 477, line 2 from top, after "c. 16" add, "but that act does not the assignees to do more than the bankrupt might have du makes no difference as to the party who shall bring the act
- --- 572, add to Bright v. Walker, "See Moumouth Canal Comp Harford, post, Vol. V. p. 68."
- ---- 611, line 4 of note (a), after "2 Camp. 103" add, "See Spa Hawkes, 2 Esp. 504."

- --- 661, line 14, after "bankraptcy," add a].
- ----- 670, note to Bate v. Kinsey, add "See 1 Adol. & Ell. R. Si 3 Stark. C. N. P. 140, Harris v. Hill."
- --- 695, Emery v. Day, add "See Fietcher v. Greenwell, H. 1885, 5
 - ---- 736, note (e) add " And see Reed v. Dickons, 5 B. & Ad. 499."
 - --- 768, line 2 from top, for "their laws" read "this law."
 - ----- 701, add to Hutchinsen's argument " See 1 Chirty on Pl. 4th ed 4 Dowl. & Ryl. 215, Parker v. Bailey."
 - —— 852, marginal note, line 8 from hottom, for "a disclaimer" reac admission of an antecedent disclaimer."
 - ---- 892, line 20, before "9 and 10 &c. " insert "5 W. & M. c. 21. repeated in"

For the convenience of the Profession, the Rules promulgated in Hilary Term, 1834, and which took effect on the first day of Easter Term, 1834, are prefixed to the present Number, but are intended to be placed at the end of the Volume.

REGULÆ GENERALES (a).

Hilary Term, 1834.

1834.

1. 1

REGULÆ GENERALES.

- IT IS ORDERED, That from and after the first day of Easter Term next inclusive, the following Rules shall be in force in the Courts of King's Bench, Common Pleas, and Exchequer of Pleas and Courts of Error, in the Exchequer Chamber.
- 1. No demurrer, nor any pleading subsequent to the declara- Demurrers to be delivered, not fled. tion, shall in any case be filed with any officer of the Court, but the same shall always be delivered between the parties.
- 2. In the margin of every demurrer, before it is signed by Demurrers decounsel, some matter of law intended to be argued shall be livered without statement in mar stated: and if any demurrer shall be delivered, without such be argued, or with statement, or with a frivolous statement, it may be set aside as frivolous statement—conseirregular, by the Court or a Judge, and leave may be given to quences. sign judgment as for want of a plea.

Provided, that the party demurring may, at the time of the Proviso that the argument, insist upon any further matters of law, of which notice may on argument a the Count in the world may be insist on further shall have been given to the Court in the usual way.

natters of which Court has had usual notice.

- 3. No rule for joinder in demurrer shall be required, but the Joinder in departy demurring may demand a joinder in demurrer, and the manded and de-opposite party shall be bound, within four days after such deopposite party shall be bound, within four days after such de- livered in four days, or judgment, mand, to deliver the same, otherwise judgment.
- 4. To a joinder in demurrer no signature of a serjeant or other No signature to counsel shall be necessary, nor any fee allowed in respect thereof.
- 5. The issue or demurrer book shall on all occasions be made Issues and deup by the suitor, his attorney or agent, as the case may be, and to be made up by not as heretofore by any officer of the Court.

(a) The marginal notes, &c. are added by the Reporter for more convenient reference.

VOL. IV.

1834.

REGULÆ GENERALES.

No motion for concilium. Demurrers, special cases and verdicts, how set down for argument.

Delivering copies of demurrer books, &c. to judges.

Consequences of default.

6. No motion or rule for a concilium shall be required; 'demurrers, as well as all special cases and special verdicts, all be set down for argument at the request of either party, with Clerk of the Rules in the King's Bench and Exchequer, as Secondary in the Common Pleas, upon payment of a fee of shilling, and notice thereof shall be given forthwith by such put to the opposite party.

7. Four clear days before the day appointed for argument, plaintiff shall deliver copies of the demurrer book, special c or special verdict, to the Lord Chief Justice of the King's Be or Common Pleas, or Lord Chief Baron, as the case may be, the senior Judge of the Court in which the action is broug and the defendant shall deliver copies to the other two Judge the Court next in seniority; and in default thereof by eiparty, the other party may on the day following delivers copies as ought to have been so delivered by the party mal default: and the party making default shall not be heard uhe shall have paid for such copies, or deposited with the Clof the Rules in the King's Bench and Exchequer, or the Set dary in the Common Pleas, as the case may be, a sufficient to pay for such copies.

Requisites of plea of judgment recovered in another court, and consequences of neglect to comply with them, or of false statement.

8. Where a defendant shall plead a plea of judgment recover in another Court, he shall in the margin of such plea state date of such judgment, and if such judgment shall be in a Co of Record, the number of the roll on which such proceedings entered, if any; and in default of his so doing, the plaintiffs be at liberty to sign judgment as for want of a plea; and in the same be falsely stated by the defendant, the plaintiff, on judging a certificate from the proper officer or person having custody of the records or proceedings of the Court where sjudgment is alleged to have been recovered, that there is no record or entry of a judgment as therein stated, shall be at lib to sign judgment as for want of a plea, by leave of the Court Judge.

Writ of error no supersedeas of execution till notice of allowance served, stating particular error to be argued.

Consequence if error stated be frivolous.

9. No writ of error shall be a supersedeas of execution service of the notice of the allowance thereof, containing a sment of some particular ground of error intended to be argu

Provided, that if the error stated in such notice shall ap to be frivolous, the Court, or a Judge, upon summons, may a execution to issue.

- 10. No rule to certify or transcribe the record shall be necessary; but the plaintiff in error shall, within twenty days after the allowance of the writ of error, get the transcript prepared and examined with the Clerk of the Errors of the Court in which the Transcript to be judgment is given, and pay the transcript money to him; in de- examined with the fault whereof the defendant in error, his executors or administrators, shall be at liberty to sign judgment of non pros. Clerk of the Errors shall, after payment of the transcript money, Writ of error and deliver the writ of error when returnable, with the transcript an- transcript, how nexed, to the Clerk of the Errors of the Court of Error.
- 11. No rule to allege diminution, nor rule to assign errors, nor such delivery, or in scire facias quare executionem non, shall be necessary, in order twenty days after to compel an assignment of errors; but within eight days after cores mobile or the writ of error, with the transcript annexed, shall have been error shall assign delivered to the Clerk of the Errors of the Court of Error, or to does not, judgment the signer of the writs in the King's Bench in cases of error to be signed, that Court, or within twenty days after the allowance of the writ Rules to allege diof error in cases of error coram nobis, or coram vobis, the plain-miaution, assign errors, and sel. fa. tiff in error shall assign errors, and in failure to assign errors, the quare execution defendant in error, his executors or administrators, shall be en-ed. titled to sign judgment of non pros.
- 12. The assignment of errors and subsequent pleadings thereon Assignment of shall be delivered to the attorney of the opposite party, and not delivered to oppofiled with any officer of the Court.
- 13. No scire facias ad audiendum errores shall be necessary Sci. fa. ad aud. (unless in case of a change of parties), but the plaintiff in error may demand a joinder in error, or plead to the assignment of Defendant in error errors; and the defendant in error, his executors or administrators, shall be bound, within twenty days after such demand, to deliver a joinder or plea, or to demur, otherwise the judgment shall be reversed.

Provided, that if in any case the time allowed as hereinbefore mentioned, for getting the transcript prepared and examined, for assigning errors, or for delivering a joinder in error, or plea, or demurrer, shall not have expired before the tenth day of August in any year, the party entitled to such time shall have the like time for the same purpose, after the twenty fourth day of October, without reckoning any of the days before the tenth of

Provided also, that in all cases such time may be extended by Extending time by Judge's order. a Judge's order.

1834. REGULE

GENERALES.

The allowance, without rule to certify or

delivered.

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site attorney.

errores abolished.

must join in error, plead to the assignment, or demur, within 20 days after demand of joinder, &c. or judgment re-

Proviso if the above times have not expired before

1834.

REGULE.

Sci. fa. to terretenants in error to reverse fines, &c. Setting down and arguing issue in law in Court of Error. Provided also, that in all cases of writs of error to refines and common recoveries, a scire facias to the terrete shall issue as heretofore.

14. When issue in law is joined, either party may set do case for argument with the Clerk of the Errors of the Co Errors, or the Clerk of the Rules in the King's Bench, case may require, and forthwith give notice in writing the the other party, and proceed to argument in like manner a demurrer, without any rule or motion for a concilium.

15. Four clear days before the day appointed for argu

Delivering copies of judgment below, of the assignment of errors, and of the pleadings thereon, to Judges.

the plaintiff in error shall deliver copies of the judgment Court below, and of the assignment of errors, and of the ings thereon, to the Judges of the King's Bench, on writs o from the Common Pleas or Exchequer, and to the Judges Common Pleas on writs of error from the King's Bench the defendant in error shall deliver copies thereof to the Judges of the Court of Exchequer Chamber, before who case is to be heard; and in default by either party, the party may deliver such books as ought to have been delive the party making default, and the party making default sl be heard until he shall have paid for such copies, or de with the Clerk of the Errors, or the Clerk of the Rules

Consequences of default.

Proceedings in error need not be entered of record till after judgment in the Court of Error.

copies.

16. No entry on record of the proceedings in error shall cessary before setting down the case for argument, but judgment shall have been given in the Court of Errors Exchequer Chamber, either party shall be at liberty to er proceedings in error on the judgment roll remaining in the below, on a certificate of a Clerk of the Errors of the quer Chamber of the judgment given, for which a fee of and no more, shall be charged.

King's Bench, as the case may be, a sufficient sum to pay for

Notice of taxation not necessary where no appearance.

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17. Notice of taxing costs shall not be necessary in a where the defendant has not appeared in person, or by his ney or guardian, notwithstanding the general rule of Term, 1st Will. IV. s. 12.

Repassing nisi prius records abolished. Amending teste and return of di tringas, habeas

corpora, or clause of nisi prius. 18. It shall not be necessary to repass any Nisi Prius which shall have been once passed, and upon which the passing shall have been paid; and if it shall be neces amend the day of the teste and return of the distringas or

corpora, or of the clause of Nisi Prius, the same may be done by the order of a Judge obtained on an application ex parte.

19. Writs of trial shall be sealed only, and not signed.

20. Either party, after plea pleaded and a reasonable time before trial, may give notice to the other, either in town or country, in the form hereto annexed, marked A, or to the like dence written or effect, of his intention to adduce in evidence certain written or ments, and calling printed documents; and unless the adverse party shall consent them. by indorsement upon such notice, within forty-eight hours, to make the admission specified, the party requiring such admission summons, if admay call on the party required, by summons, to shew cause before a Judge, why he should not consent to such admission; or in case of refusal, be subject to pay the costs of proof. less the party required shall expressly consent to make such ad- Judge may order mission, the Judge shall, if he think the application reasonable, costs of proving make an order that the costs of proving any document specified paid by party required to admit it, in the notice, which shall be proved at the trial to the satisfac-whatever may be the result of the tion of the Judge or other presiding officer, certified by his cause. indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause.

Provided that if the Judge shall think the application unrea- Application unreasonable, he shall indorse the summons accordingly.

Provided also, that the Judge may give such time for inquiry Time for inquiry, or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit.

If the party required shall consent to the admission, the Judge Consent to admisshall order the same to be made.

No costs of proving any written or printed document shall be Costs of proving allowed to any party who shall have adduced the same in evidence lowed, unless this notice has been on any trial, unless he shall have given such notice as aforesaid, notice has been and the adverse party shall have refused or neglected to make party has refused or neglected to such admission, or the Judge shall have indorsed upon the summons that he does not think it reasonable to require it.

A Judge may make such order as he may think fit respecting Judge may make the costs of the application and the costs of the production and order as to costs of application, and in the absence of a special order, the same shall if he does not, they are costs in be costs in the cause.

(Signed by the fifteen Judges.)

1834.

REGULE GENERALES. Writs of trial.

Notice to opposite party of intention to adduce in evion him to admit

sonable.

inspection, &c.

was not ressonable to require it.

the cause.

1834.

REGULE
GENERALES.
Form of such
Notice.

FORM OF NOTICE REFERRED TO.

In the K. B.
C. P.
or Exchequer

A. B. v. C. D.

Take notice, that the { Plaintiff Defendant } in this cause proposes to adduce dence the several documents hereunder specified, and that the same inspected by the { Defendant Plaintiff } his attorney, or agent, at on , between the hours of ; and t { Defendant Plaintiff } will be required to admit that such of the said document specified to be originals, were respectively written, signed, or executed, purport respectively to have been; that such as are specified as copies; and such documents as are stated to have been served, sent, or delivered respectively; saving all just exception admissibility of all such documents as evidence in this cause. Dated, &

To E. F. Attorney

or agent for { Defendant } Plaintiff }

[Here describe the documents, the manner of doing which may be as follows:

ORIGINALS.

Description of the Documents.		Date.	
Indenture of Lease from A Indenture of Release between the Keter, Defendant to Plain Policy of Insurance on C Voyage from Oporto to Memorandum of Agreem of said Ship, and E. F. Bill of exchange for 100l.	reen A. B. and C. D., 1st	lst February, 2d February. 1st March, 3d December, lst January,	1 1 1 1 1
	COPIES.		
Description of Documents.	Date.	Original, or Du served, sent, or de when, how, and by	
Register of Baptism of A. B. in the Parish of X.	lst January, 1808		

Sent by General
2d February, I
Served 2d March

on Defendant's ney, by E. F. of

Record of a Judgment of the Court of King's Bench in an Action J. S. v. J. N. Letters Patent of King Charles 11. in the Rolls Lst January, 1680

Chapel

1834. RECULE. GENERALES.

PLEADING.

WHEREAS it is provided by the statute 3 & 4 Will. 4. c. 42. Recital of 3 & 4 Will. 4. c. 42. 1.1. s. 1, That the Judges of the Superior Courts of Common Law giving the judges power to alter by at Westminster, or any eight or more of them, of whom the rule or order ma chiefs of each of the said Courts should be three, should and might by any Rule or Order to be from time to time by them made, in term or vacation, at any time within five years from the time when the said act should take effect, make such alterations in the mode of pleading in the said Courts, and in Mode of pleading, the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and such regulations as to the payment of costs, and otherwise, for carrying into effect the said alterations, as to them might seem expedient; which Rules, Orders, and Regulations, were to be laid before such rules not to both Houses of Parliament, as therein mentioned, and were have effect till six weeks after laid not to have effect until six weeks after the same should have before both been so laid before both Houses of Parliament, but, after that time, should be binding and obligatory on the said Courts, and all other Courts of Common Law, and be of the like force and effect, as if the provisions contained therein had been expressly enacted by parliament.

within 5 years.

Provided that no such Rule or Order should have the effect of Provise that a depriving any person of the power of pleading the general deprive party of issue, and of giving the special matter in evidence in any case general is wherein he then was, or thereafter should be entitled so to do in evidence when by virtue of any act of parliament then or thereafter to be in any act of parliament then or thereafter to be in any act of parliament then or thereafter to be in any act of parliament then or thereafter to be in any act of parliament then or thereafter to be in any act of parliament then or thereafter to be in any act of parliament then or thereafter to be in any act of parliament then or thereafter to be in any act of parliament then or thereafter to be in any act of parliament then or thereafter to be in any act of parliament then or thereafter to be in any act of parliament then or thereafter to be in any act of parliament then or thereafter to be in any act of parliament then or thereafter to be in any act of parliament then or thereafter to be in any act of parliament the act of the parliament the p force.

so to do.

It is therefore Ordered, That from and after the first day of Easter Term next inclusive, unless parliament shall in the meantime otherwise enact, the following Rules and Regulations, made pursuant to the said statute, shall be in force:-

FIRST—GENERAL RULES AND REGULATIONS.

1. Every pleading, as well as the declaration, shall be entitled All pleadings to be catified by day of of the day of the month and year when the same was pleaded, month and year, and shall bear no other time or date; and every declaration, and tered on his pries other pleading, shall also be entered on the record made up for ment roll, except

by judge.

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1834.

REGULA. GENERALES.

No entry of continuauces to be on roll except the jurata ponitur in respecta.

trial, and on the judgment roll, under the date of the day month and year when the same respectively took plac without reference to any other time or date, unless oth specially ordered by the Court or a Judge.

2. No entry of continuances by way of imparlance, curi sari vult, vicecomes non misit breve, or otherwise, shall be upon any record or roll whatever, or in the pleadings, exc jurata ponitur in respectu, which is to be retained. (See No. 3, p. xix.)

Times of proceeding in cause not altered.

Pleas pais darrein continuance, how pleaded.

Provided that such regulation shall not alter or affect a isting rules of practice, as to the times of proceeding in the

Provided also, that in all cases in which a plea puis continuance is now by law pleadable, in Banc or at Nisi the same defence may be pleaded, with an allegation th matter arose after the last pleading, or the issuing of the process, as the case may be.

Affidavit that the matter arose within 8 days before such plea pleaded.

Provided also, that no such plea shall be allowed, accompanied by an affidavit, that the matter thereof arose eight days next before the pleading of such plea, or unl Court or a Judge shall otherwise order.

All judgments to be entered of record of day, of month, and year, when signed, and to relate to no other day.

But Judge, &c. may order an entry nune pro tune.

No entry on record of warrauts to suc,

Pleading Rules-Several Counts, Pleas, Avoicries, &c. and Pleas in bur in replevin.

3. All judgments, whether interlocutory or final, sl entered of record of the day of the month and year, whe term or vacation, when signed, and shall not have relation other day.

Provided that it shall be competent for the Court, or a to order a judgment to be entered nunc pro tunc.

- 4. No entry shall be made on record of any warrants o ney to sue or defend.
- 5. (a) And whereas, by the mode of pleading hereinaft scribed, the several disputed facts material to the merits case will, before the trial, be brought to the notice of the tive parties, more distinctly than heretofore; and by tl act of the 3 & 4 Will. 4, c. 42, s. 23, the powers of ame at the trial, in cases of variance in particulars not materia Several counts not merits of the case, are greatly enlarged; several counts sl be allowed, unless a distinct subject-matter of complaint ject of compaint intended to be established in respect of each, nor shall ap on erca. Nor several pleas, pleas, or avowries, or cognizances, be allowed, unless a ground of answer or defence is intended to be establis respect of each.
 - (a) This 5th rule does not apply where the declaration bears date b 1st day of Easter Term, 1834. See p. xviii. post.

to be allowed unless distinct subject of complaint SAMMALICE OF CORm.sances, unless duties ground of ammer intended in respect of each.

1834.

Therefore counts, founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed.

Pleading Rules
-- Neveral Counts,
Pleas, Avouries,
&c. and Pleas in bar in replevin. matter of complaint, but varied in statement, &c only, not allowed. clarations.

Counts founded upon the same contract, described counts on one in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed, for they are founded on the same subject-matter of complaint, and are only variations Examples of dein the statement of one and the same contract.

condition, &c. bill in payment for goods and for orice of them to

Contracts without

So counts for not giving, or delivering, or accepting a bill of exchange in payment, according to the contract for sale for goods Non-delivery of sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed.

same as bargained and sold.

be paid in money.

So counts for not accepting and paying for goods sold, and for Not accepting and the price of the same goods as goods bargained and sold, are not paying for goods and for price of to be allowed.

But counts upon a bill of exchange or promissory note, and On bill or note, for the consideration of the bill or note in goods, money, or and for the consideration thereof, otherwise, are to be considered as founded on distinct subject- in goods, &c. &c. are to be allowed. matters of complaint, for the debt and the security are different contracts; and such counts are to be allowed.

Two counts upon the same policy of insurance are not to be Policy of insurallowed.

But a count upon a policy of insurance, and a count for money Premiums. had and received, to recover back the premium, upon a contract implied by law, are to be allowed.

Two counts on the same charter-party are not to be allowed. Charter-party. But a count for freight upon a charter-party, and for freight Preight.

pro ratá itineris, upon a contract implied by law, are to be allowed. Counts upon a demise, and for use and occupation of the same Demise, and use land for the same time, are not to be allowed.

In actions of tort for misseazance, several counts for the same Tort for missea-

zance.

injury, varying the description of it, are not to be allowed. In the like actions for nonfeazance, several counts, founded on Tort for nonfea-

varied statements of the same duty, are not to be allowed.

Several counts in trespass for acts committed at the same time Trespass. and place are not to be allowed.

Where several debts are alleged in indebitatus assumpsit to be Statement of each due in respect of several matters—ex. gr. for wages, work and indebitative as-labour as a hired servant, work and labour generally, goods sold considered as and delivered, goods bargained and sold, money lent, money though only one paid, money had and received, and the like, the statement of promise to pay

HILARY TERM, IV WILLIAM IV.

1554

X

Panaling Baler-Steurus Chante, Pleas, Accourted &c. and Pleas in her in replevia. Except account stated. each debt is to be considered as amounting to a several co within the meaning of the rule which forbids the use of sev counts, though one promise to pay only is alleged in considtion of all the debts.

Provided that a count for money due on an account stated be joined with any other count for a money demand, thou may not be intended to establish a distinct subject-matte complaint in respect of each of such counts.

The rule which forbids the use of several counts, is not t considered as precluding the plaintiff from alleging more brea than one of the same contract in the same count.

Er. gr. Pleas, avownes, and cognizances, founded on and the same principal matter, but varied in statement, destest, or commissioners only, (and pleas in bar in replevin within the rule, are not to be allowed.

First of which in them until it with post them are both plet mathematic variet in the circumstance of time only, and are until allowed.

But mean if payment mit if accord and satisfaction, or of one are distinct mit me to be allowed.

Peas of an agreement transport the security of A, B, in marge of the plaintiff's demand, and of an agreement to acome security of C, D, for the like purpose, are also distinct, to be allowed.

But pleas of an agreement of recent the security of a trees of in discharge of the manner's isomend, and of the agreement, describing it is in agreement to forbear fitime, in consideration of the same security, are not distinct; they are only variations in the succement of one and the agreement, whether more or less examisive, in consideration the same security, and not to be allowed.

In trespass quare clauses free, these of soil and freeholthe defendant in the locus or quit and of the defendant's righ an easement there, pleas of right of way, of common of past of common of turbary, and of common of estovers, are distiand are to be allowed.

But pleas of right of common at all times of the year, an such right at particular times, or in a qualified manner, are to be allowed.

So pleas of a right of way over the locus in quo, varying termin or the purposes, are not to be allowed.

Avowries for distress for rent, and for distress for dam feasant, are to be allowed.

More brenches then one may be laid in the same count.

Score Per-

Bodgerio andre esta (Mes delle

Manager and the second
Spiritument 1. Spiritument 5 Military materials 1 ff Table

Agreement to fire than fift a time of teacherston of feath sportray.

Lib. Sts.—rasemeion, rights of way and overmore common of turbers and entertors.



But avowries for distress for rent, varying the amount of rent reserved, or the times at which the rent is payable, are not to be allowed.

The examples in this and other places specified, are given as &c. and Ph some instances only of the application of the Rules to which they Distress for real relate, but the principles contained in the Rules are not to be These examples considered as restricted by the examples specified.

6. Where more than one count, plea, avowry, or cognizance Where more than shall have been used in apparent violation of the preceding Rule, &c. used, opposite the opposite party shall be at liberty to apply to a judge, sugparty may apply
to indge for order
gesting that two or more of the counts, pleas, avowries, or cogpleas, counts, &c. nizances are founded on the same subject-matter of complaint, or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognizances, introduced in violation of the Rule, be struck out at the cost of the party pleading, whereupon the Judge shall order accordingly, unless he shall be satisfied, Judge shall order upon cause shown, that some distinct subject-matter of complaint may indorse that is bond fide intended to be established in respect of each of such subject-matter of counts, or some distinct ground of answer or defence in respect complaint, nawer, or defence intendof each of such pleas, avowries, or cognizances, in which case he ed to be established in respect shall indorse upon the summons, or state in his order, as the case of each count, plea, ac. specifying may be, that he is so satisfied; and shall also specify the counts, which count, deshall be allowed. pleas, avowries, or cognizances mentioned in such application which shall be allowed.(a)

1834. Pleading R Several Con Pleas, Avo only instances of application of rules.

7. Upon the trial where there is more than one count, plea, avowry, or cognizance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect &c. and no distinct of each count of each cou of each count, or some distinct ground of answer or defence in fence made out in respect of each plea, avowry, or cognizance, a verdict and judgrespect of each plea, avowry, or cognizance, a verdict and judg-ment shall pass against him upon each count, plea, avowry, or against plaintiff or cognizance which he shall have so failed to establish, and he shall defendant on each count, &c. on which such combaint or defendent on each count, acc. on which such combaint or defendent on each count. count, plea, avowry, or cognizance, including those of the evidence as well as those of the pleadings; and further, in all cases oned there in which an application to a Judge has been made under the prered peaking, to be peak to the other ceding Rule, and any count, plea, avowry, or cognizance allowed party. as aforesaid, upon the ground that some distinct subject-matter of complaint was bond fide intended to be established at the trial in respect of each count so allowed, or some distinct ground of Party how depri-

Where on trial there is more than respect of each. defendant on each plaint or defence is not made out, with costs occurs well of evidence

ved of costs, &c.

(a) This 6th rule does not apply to any case in which the declaration bears date before the 1st day of Easter term, 1834. See p. xviii. post.

1834.

REGULE.

If no distinct subject-matter of complaint or defence was bona fide intended to be established on each count or plea &c. allowed by judge, and misi pries judge so certifies.

answer or defence in respect of each plca, avowry, or cogn so allowed, if the Court or Judge, before whom the trial shall be of opinion that no such distinct subject-matter of plaint was bond fide intended to be established in respect a count so allowed, or no such distinct ground of answer or a in respect of each plea, avowry, or cognizance so allowed shall so certify before final judgment, such party so p shall not recover any costs upon the issue or issues upon the succeeds, arising out of any count, plea, avowry, or cogn with respect to which the Judge shall so certify. (a)

Venue, how stated.

8. The name of a county shall in all cases be stated margin of a declaration, and shall be taken to be the vertended by the plaintiff; and no venue shall be stated in the of the declaration, or in any subsequent pleading. (b)

Local description.

Provided, that in cases where local description is now re such local description shall be given.

Actionem non, precludi non, and prayer of judgment, abolished. 9. In a plea or subsequent pleading intended to be pleader of the whole action generally, it shall not be necessary any allegation of actionem non, or to the like effect, or any of judgment, nor shall it be necessary in any replication or quent pleading, intended to be pleaded in maintenance whole action, to use any allegation of precludi non, or to t effect, or any prayer of judgment; and all pleas, replicatio subsequent pleadings, pleaded without such formal paraforesaid, shall be taken, unless otherwise expressed, as prespectively in bar of the whole action, or in maintenance whole action. Provided, that nothing herein contained sh tend to cases where an estoppel is pleaded.

Estoppel.

Defence in plea.

10. No formal defence shall be required in a plea, and commence as follows:

The said defendant by says, that

his attorney [or, " in persor

Pleading, &c. several matters. 11. It shall not be necessary to state in a second or other of avowry, that it is pleaded by leave of the Court, or acc to the form of the statute, or to that effect.

Protestation.

- 12. No protestation shall hereafter be made in any ple but either party shall be entitled to the same advantage i or other actions, as if a protestation had been made.
- (a) Nothing in 7th rule applies to a case in which the declaration between the 1st day of Easter term, 1834. See p. xviii. post.

 (b) See Harper v. Champneys, on special demurrer, Exchequer, June 4

HILARY TERM, IV WILLIAM IV.

13. All special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country.

REGULE GENERALES. Pleading over to inducement in traverse. Demurrer.

1834.

Provided that this regulation shall not preclude the opposite party from pleading over to the inducement, when the traverse Special traverses is immaterial.

14. The form of a demurrer shall be as follows:

his attorney [or, "in person," &c. on, [or, "plea," &c.] is not sufficient The said defendant, by or, "plaintiff"] says that the declaration, [or, "plea," &c. in law;—showing the special causes of demurrer, if any.

Joinder.

The form of a joinder in demurrer shall be as follows: The said plaintiff, [or, "defendant"] says that the declaration [or, "plea,"

&c.] is sufficient in law.

15. The entry of proceedings on the record for trial, or on the Entry of proceedjudgment roll, (according to the nature of the case,) shall be trial or on judgtaken to be, and shall be in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record, and no fees shall be payable in respect of any prior entry made, or supposed to be made, on any roll or record whatever.

ment roll.

16. No fees shall be charged in respect of more than one issue Officers fees on by any of the officers of the Court, or of any Judge at the assizes, or any other officer, in any action of assumpsit, or in any action of debt on simple contract, or in any action on the case.

17. When money is paid into Court, such payment shall be Payment of money pleaded in all cases, and as near as may be in the following form, pleaded. mutatis mutandis:

C. D. The day of lis attorney

[or, "in person," &c] says, that the plaintiff ought not further
to maintain his action, because the defendant now brings into A. B. Court the sum of £ ready to be paid to the plaintiff. And the defendant further says, that the plaintiff has not sustained damages [or. in actions of debt, "that he is not indebted to the plaintiff,"] to a Lor, in actions of debt, "that he is not indebted to the plaintiff,"] to a greater amount than the said sum exc. in respect of the cause of action in the declaration mentioned, and this he is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his action.

18. No Rule or Judge's order to pay money into Court shall How to be done Rule to pay me-be necessary, except under the 3 & 4 Will. 4, c. 42, s. 21, but ney into Court the money shall be paid to the proper officer of each Court, who shall give a receipt for the amount in the margin of the plea, and the said sum shall be paid out to the plaintiff on demand.

19. The plaintiff, after the delivery of a plea of payment of Replication to money into Court, shall be at liberty to reply to the same, by plea of payment into Court. accepting the sum so paid into Court in full satisfaction and discharge of the cause of action in respect of which it has been paid

xiv

1834.

REGULE.
GENERALES.
Taxing costs and signing judgment for them.

in, and he shall be at liberty in that case to tax his costs of and in case of non-payment thereof within forty-eight hour sign judgment for his costs of suit so taxed, or the plaintiff reply "that he has sustained damages, [or, 'that the defen is indebted to him,' as the case may be,] to a greater amount the said sum," and in the event of an issue thereon being for the defendant, the defendant shall be entitled to judgment his costs of suit.

Plea, abatement in of non-joinder. 20. In all cases under the 3 & 4 Will. 4, c. 42, s. 10, in we after a plea in abatement of the non-joinder of another per the plaintiff shall, without having proceeded to trial on an inthereon, commence another action against the defendant defendants in the action in which such plea in abatement have been pleaded, and the person or persons named in plea in abatement as joint contractors, the commencement of declaration shall be in the following form:

Form.

(Venue)—A. B., by E. F. his attorney, [or, "in his own proper per &c.] complains of C. D. and G. H. who have been summoned to at the said A. B., and which C. D. has heretofore pleaded in abatemer non-joinder of the said G. H. &c. (The same form to be used m mutandis in cases of arrest or detainer.)

Actions by and against assignees, executors, or nominal parties. 21. In all actions by and against assignees of a bankrup insolvent, or executors or administrators, or persons author by act of parliament to sue or be sued as nominal parties, character in which the plaintiff or defendant is stated on record to sue or be sued, shall not in any case be considered in issue, unless specially denied.

PLEADINGS IN PARTICULAR ACTIONS.

[N. B. Nothing in the following rules applies to any case which the declaration bears date before the 1st day of Ea Term, 1834. See p. xviii. post.]

I. ASSUMPSIT.

Non assumpsil, effect of.

1. In all actions of assumpsit, except on bills of exchange promissory notes, the plea of non assumpsit shall operate only a denial in fact of the express contract or promise alleged, of the matters of fact from which the contract or promise alleged may be implied by law.

In warranties.

Ex. gr. In an action on a warranty, the plea will operate

a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of In policies. the risk, of the loss, or of the alleged compliance with warranties.

1854. REGULE GENERALES.

In actions against carriers and other bailees for not delivering In actions against or not keeping goods safe, or not returning them on request, and carriers and other in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

In an action of indebitatus assumpsit for goods sold and deli- In actions for vered, the plea of non assumpsit will operate as a denial of the livered, and mo. sale and delivery in point of fact; in the like action for money ney had and rehad and received, it will operate as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

2. In all actions upon bills of exchange and promissory notes, in actions on bills the plea of non assumpsit shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; e. g. the drawing or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.

3. In every species of assumpsit, all matters in confession and Pleas in assumpsit avoidance, including not only those by way of discharge, but and in confession those which show the transaction to be either void or voidable in be specially pleadpoint of law, on the ground of fraud or otherwise, shall be specially pleaded. Ex. gr. infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded.

4. In actions on policies of assurance, the interest of the Policies of assurassured may be averred thus:—" That A., B., C. and D., or some or one of them, were or was interested, &c.;" and it may also be averred, "that the insurance was made for the use and benefit, and on the account of the person or persons so interested."

II. IN COVENANT AND DEBT.

1. In debt on specialty, or covenant, the plea of non est factum Effect of non est shall operate as a denial of the execution of the deed in point of factum.

fact only, and all other 1834.

including matters which REGULF as those which make it GENERALES.

Nil debet abo-2. The plea of nil del 3. In actions of debt Pleas in debt on simple contract. exchange and promisso

" he never was indebted tion alleged," and such plea of non assumpsit is confession and avoidan directed in actions of as

HILARY 7

been hitherto allowed, i promissory notes, the d ticular matter of fact a cially in confession and

4. In other actions of

Effect of non de-The plea of non detin tion of the goods by the perty therein; and no

admissible under that p

1. In actions on the Effect of not

as a denial only of the 1 have been committed by

in the inducement, and be admissible under tha issue on some particular In nuisance. Ex. gr. In an action o

> tion of a house, by carry guilty will operate as a the alleged trade in sucl pation of the house;

> > obstructing a right of v the obstruction only, an in an action for conver only, and not the plaint

plaintiff's occupation of

In obstructing

guiky.

;

xvi

HILARY TERM, IV WILLIAM IV.

xvii

slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade, but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged. In actions for an escape, it will operate In escape. as a denial of the neglect or default of the sheriff, or his officers, but not of the debt, judgment, or preliminary proceedings. this form of action against a carrier, the plea of not guilty will Against carriers. operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

1834. REGULE GENERALES.

2. All matters in confession and avoidance shall be pleaded Confession and specially, as in actions of assumpsit.

avoidance.

V. IN TRESPASS.

1. In actions of trespass quare clausum fregit, the close or place Abuttals-locus in in which &c. must be designated in the declaration by name or quo. abuttals, or other description, in failure whereof the defendant may demur specially.

2. In actions of trespass quare clausum fregit, the plea of not Not guilty in treeguilty shall operate as a denial that the defendant committed the pass quare chantrespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially.

3. In actions of trespass de bonis asportatis, the plea of not Not guilty in treeguilty shall operate as a denial of the defendant having committed pass de bonis asthe trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein.

4. Where in an action of trespass quare clausum fregit, the Pleading right of defendant pleads right of way with carriages and cattle and on foot in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved, as shall be justified by the right of way so found, and for the plaintiff, in respect of such of the trespasses as shall not be so justified.

5. And where, in an action of trespass quare clausum fregit, the Pleading rights of defendant pleads a right of common of pasture for divers kinds common.

HILARY TERM, IV WILLIAM IV.

xviii

REGULE GENERALES. of cattle, ex. gr. horses, sheep, oxen and cows, and issue is thereon, if a right of common for some particular kind of monable cattle only be found by the jury, a verdict shall for the defendant in respect of such of the trespasses prov shall be justified by the right of common so found, and for plaintiff in respect of the trespasses which shall not be so just

Allegations as to extent of rights of way or common to be taken distributively.

6. And in all actions in which such right of way or cor as aforesaid, or other similar right, is so pleaded, that the a tions as to the extent of the right are capable of being cons distributively, they shall be taken distributively.

Provided nevertheless, that nothing contained in the 5th or 7th, of the above-mentioned General Rules and Regula or in any of the above-mentioned Rules or Regulations re to pleading in particular actions, shall apply to any case in the declaration shall bear date before the first day of F Term next [1834].

Issues, Judgments, and other Proceedings, in Actions menced by process under 2 Will. IV. c. 39. shall be it several forms in the Schedule hereunto annexed, or to like effect, mutatis mutandis. Provided, that in case of compliance, the Court or Judge may give leave to amend

No. 1.

Form of an Issue in the King's Bench, Common Pleas, or Exchequer In the King's Bench; or, In the Common Pleas; or,

The (a) day of the year of our Lord 18.

(Venue.) A. B., by E. F. his attorney [or, in his own proper person, E. F., who is admitted by the Court here to prosecute for the said A: I is an infant within the age of twenty-one years, as the next friend of the A. B., as the case may be], complains of C. D., who has been summon answer the said A. B. [or, arrested or detained in custody], by virtu served with a copy, as the case may be,] of a writ issued on (b) the day of , in the year of our Lord 18, out of the Court of ow the King before the King himself, at Westminster, [or, out of the Court Lord the King before the Barons of his Exchequer at Westminster, as the may be], for that

[Copy the declaration from these words to the end, and the plea and

sequent pleadings, to the joinder of issue.]

Thereupon the sheriff is commanded that he cause to come here, day of , twelve &c., by whom &c., and who neithe to recognize &c., because as well &c.

(a) Date of declaration.

In the Exchequer.

(b) Date of first writ.

No. 2.

Form of Nisi Prius Record in the King's Bench, Common Pleas, or Exchequer.

[The placitas are to be omitted .- Copy the issue to the end of the award of the venire, and proceed as follows:]

day of Afterwards on the (a) in the year the jury between the parties aforesaid is respited here until the (b)

day of shall first come on the (c) unless day of according to the form of

the statute in such case made and provided for default of the jurors, because none of them did appear; therefore let the sheriff have the bodies of the said jurors accordingly.

The postea is to be in the usual form.]

No. 3.

Form of Judgment for the Plaintiff in Assumpsit.

[Copy the issue to the end of the award of the venire, and proceed as follows:] Afterwards the jury between the parties is respited [see p. viii.] until the (d) shall first come on the (e) day of unless day of according to the form of the statute in that case made and provided for default of the jurors, because none of them did appear. Afterwards on the (f)day of come the parties aforesaid, by their respective attornies aforesaid, [or as the case may be,] and

before whom the said issue was tried, hath sent hither his record had before him in these words:

[Copy postea.]
Therefore it is considered that the said A. B. do recover against the said C. D. his said damages, costs, and charges by the jurors aforesaid in form aforesaid assessed; and also £ for his costs and charges by the Court here adjudged of increase to the said $A.\,B.$ with his assent; which said damages, costs, and charges, in the whole, amount to £ , and the said C. D. in mercy &c.

No. 4.

Form of the Issue when it is directed to be tried by the Sheriff.

[After the joinder of issue proceed as follows:]

And forasmuch as the sum sought to be recovered in this suit, and indorsed on the said writ of summons, does not exceed £20, hereupon on the (g) pursuant to the day of in the year

statute in that case made and provided, the sheriff [or, the judge of being a court of record for the recovery of debt in the said county, as the case may be,] is commanded that he summon twelve &c., who neither &c., who shall be sworn truly to try the issue above joined between the parties aforesaid, and that he proceed to try such issue accordingly, and when the same shall have been tried, that he make known to the Court here what shall have been done by virtue of the writ of our Lord the King to him in that behalf directed, with the finding of the jury thereon indorsed on the , &c.

No. 5.

Form of Writ of Trial.

William the Fourth, by, &c. To the sheriff of our county of [or, to the Judge of , being a court of record for the recovery of debt in our county of , as the case may be].

(a) Teste of distringas, or habeas corpora.

(b) Return day of distringas, or habeas corpora. (c) First day of sittings, or commission day of assizes.

(d) Return of distringas, or habeas corpora.(e) Day of sittings, or nisi prius.

Day of signing final judgment.

(g) Teste of writ of trial.

1834.

REGULE GENERALES.

1834. RECULE Generales.

Whereas A. B., in our Court before us at Westminster, [or, in our (before our Justices at Westminster, or, in our Court before the Barons of Exchequer at Westminster, as the case may be], on the (a) last, impleaded C. D. in an action on promises for as the

may be].

For that whereas one &c. [here recite the declaration as in a writ of inqu

and thereupon he brought suit.

And whereas the defendant, on the day of last, by , his attorney [or as the case may be], came into our said Court said [here recite the pleas and pleadings to the joinder of issue], and plaintiff did the like. And whereas the sum sought to be recovered in the action, and indorsed on the writ of summons therein, does not exceed 20%. it is fitting that the issue above joined should be tried before you the sheriff of [or Judge, as the case may be]: We, therefore, suant to the statute in such case made and provided, command you that yo summon twelve free and lawful men of your county, duly qualified acco to law, who are in nowise akin to the plaintiff or to the defendant, who be sworn truly to try the said issue joined between the parties aforesaid that you proceed to try such issue sourdingly; and when the same shall been tried in manner aforesaid, we command you that you make known that Westminster [or, to our Justices at Westminster, or, to the Barons of our Exchequer, as the case may be] what shall have been done by virtue of writ, with the finding of the jury hereon indorsed, on the next. Witness , at Westminster

year of our reign. day of , in the

No. 6.

Form of Indorsement thereon of the Verdict.

day of Afterwards, on the (b), in the year , b me sheriff of the county of [or Judge of the Court of came, as well the within named plaintiff as the within named defeadan their respective attornies within named [or as the case may be]; and the ju of the jury by me duly summoned, as within commanded, also came, and, t duly sworn to try the said issue within mentioned, on their oath said, that

No. 7.

Form of Indorsement thereon in case a Nonsuit takes place.

[After the words " duly sworn to try the issue within mentioned," pro

And were ready to give their verdict in that behalf; but the said A. B. I solemnly called, came not, nor did he further prosecute his said suit ag the said C. D.

No. 8.

Form of Judgment for the Plaintiff, after Trial by the Sheriff.

[Copy the Issue and then proceed as follows:]

fterwards, on the (c) day of in the year came the parties aforesaid, by their respective attornies aforesaid, [or a Afterwards, on the (c)case may be,] and the said sheriff, [or, judge, as the case may be,] before w the said issue came on to be tried, hath sent hither the said last-menti writ, with an indorsement thereon, which said indorsement is in these we to wit,

[Copy the Indorsement.] Therefore it is considered &c. [in the same form as before.]

(a) Day of trial. (b) Date of first writ of summons.

(c) Day of signing judgment.

INDEX

TO

THE PRINCIPAL MATTERS

IN THIS VOLUME.

ACCOUNT STATED.

See Money had and received.—
Pleading.

An indictment, prosecuted by the plaintiff against the defendant, for a nuisance, having been returned a true bill at one quarter sessions, was traversed to the next. The defendant was not prepared to plead at that period of the second sessions at which by the practice he was bound to do; upon which the counsel for the prosecutor said, he should press for judgment for want of a plea, unless the defendant would pay the costs of the The Court said the defendant must either plead and take his trial, or might traverse on the terms proposed by the prosecutor. The parties having come to an agreement, their counsel signed the following memorandum, indorsed on their briefs: "Traversed to the next sessions by consent, the defendant paying the costs of the day, including counsel's fees, the prosecutor giving a

copy of the replication a month before the sessions." The costs were afterwards taxed by the clerk of the peace, and the allocatur served on the defendant. When applied to for the amount, he objected to two items, which were relinquished on behalf of the prosecutor. The defendant's attorney offered at that time to give his check for the residue, but did not, it not being pressed for. a subsequent application for payment, defendant desired prosecutor's attorney to "apply to Mr. B. who received his rents, and he would arrange or pay." Held, that the arrangement between the parties at the sessions bound the defendant as an agreement, independently of that subsequent order of the Court, which sanctioned it; and therefore that the agreement taken together with the promise to arrange and pay, after ascertaining the amount, afforded evidence for a jury of an account stated. Porter v. Cooper, E. 1834. 456

A plaintiff sued on an account stated on the 5th February, the balance of which was in his favour. The defendant sought to give in evidence a subsequent account stated on 10th March, in which the balance was against the plaintiff. Held, that as the action was commenced after the new general rules of Hil. 4 W. 4. came into operation, the defendant could not prove the se-cond account stated, on the plea of non assumpsit only, but should have pleaded payment or a set-off. Fidgett v. Penny, T. 1834.

ACTING AS COMMISSIONER. 818. 822

AFFIDAVIT, ENTITLING. See Judgment in case of Nonsuit.

AFFIDAVIT OF DEBT. See ARREST .- VARIANCE.

When the affidavit of debt was for goods sold and delivered, but the writ was " in an action on the case," though indorsed with the amount of the debt: Held, that though the writ was not irregular on that account, the arrest was irregular, as there could not be a good declaration on the writ; and the defendant was discharged. Barker v. Weedon, T. 1834.

AFFIDAVIT OF MERITS.

See VENUE.

AGENT. See BILLS.

AGREEMENT.

A previous agreement will be determined by a later one, which is necessarily inconsistent with it in effect, though not containing any express stipulation in terms for so superseding it. On 28th May 1831, plaintiff agreed with defend- | See Practice. - Writ or Summe

ant for twelve months for the p formance of various literary wo to be thereafter indicated by defendant; the plaintiff to rece from the defendant for the sa six guineas a week, and not to at liberty during the above twe months to engage in any publi tion similar to that of " The Co Journal," mentioned in the agr ment. By agreement between same parties, dated 14th Octo 1831, the plaintiff agreed to t on himself the various duties editing the publication called "? Court Journal," recited to be t the entire property of the defe ant, and to devote all his time attention to the same, except hours he had already engaged devote on Saturdays and Mond to superintending a paper nau The defendant was to pay plaintiff 10l. a week: Held, the first agreement was superse by the second, so that the plain could not recover on the la after the second came into ope tion. Patmore v. Colburn. 1834.

AMBASSADOR.

The privilege from arrest enjoyed the domestic servant of an aml sador, is the privilege not of a servant, but of the ambassa Therefore, where a person sworn to be such a domestic vant, and whose duties may may not be of a domestic nat is arrested, but neither the aml sador nor any one on his be applies for his liberation, the Co will not discharge him out of tody unless he shows a clear (of domestic service. Fisher others v. Begrez, M. 1833.

AMENDMENT.

ANNUITY.

The condition of a money bond was for payment to the plaintiff of an annuity of 150l. by quarterly payments, after previously reciting that the obligee had contracted with the obligor for sale to him of a messuage, &c. in consideration, among other things, of the annuity; and further, that on the contract of purchase of the messuage, it was agreed that for the better securing payment of the said annuity, the obligor should execute that bond:—Held, that the bond was properly stamped with a 1l. 15s. deed stamp within 55 G. 3. c. 184.

Held also, that the want of involment under 53 G. 3. c. 141. the annuity act, could not be raised as an objection upon non est factum; and that if it could, it would not prevail, as involment was not required under that act, the consideration not being pecuniary. Mestayer v. Biggs, E. 1834. 466

APOTHECARY.

See Surgeon.

APPEAL.
See Poor Rate.

APPEARANCE.

In order to satisfy the Court under 2 & 3 W. 4. c. 39. s. 3. that proper means have been taken to serve a distringas on a defendant, who was a clerk in the victualling office, in order to enter an appearance against him, it should be shown not only that his residence or property could not be discovered, but that attempts had been made to serve him at the victualling office. Rouncill Bower, H. 1834. 374 By person not attorney of the Court. Bazley v. Thompson.

Irregularity in appearing by a person who is not an attorney of the court, does not entitle the opposite party to sign judgment, but only to move to set aside the proceedings.

Bazley v. Thompson, E. 1834.

ARBITRATION.

On A. and B. entering into an agreement in France, a copy of it was deposited by A. with a notary at Paris. In an action against B. on the agreement, evidence was given, that, by the usage of France, a document deposited with a notary cannot be removed:—Held, that the agreement was sufficiently proved, by production of a copy of the document so deposited; there being no satisfactory evidence of the fact, that two duplicate originals had been made.

By agreement between A. and B. made in France, any disputes which might arise between them were to be submitted by them to two arbitrators, merchants, [negotiants respectively named by them. who in case of disagreement were to have power to name an umpire. The two or the three referees might also be named by a particular court, at the request of either party:-Held, that that court might appoint an arbitrator, who was not a merchant; and also, that an act by which it annulled B.'s nomination of an arbitrator, on the ground that he was a foreigner, and appointed not two other arbitrators, but one, a Frenchman, and not a merchant, to act as referee with the nominee of A., must be taken to be legal according to the French law, till the contrary was distinctly proved.

Where on breach of an agreement entered into in *France*, and to be performed there, *French* ar-

3 z 2

bitrators awarded a sum, including the profits which the plaintiff would have made had the agreement been fulfilled:-Held, that that sum might be recovered in an action here on the award, as not being shown to be contrary to French law.

It was deposed, that two out of three provisional syndics may, by the law of France, sue to recover debts due to the bankrupt, and without the previous authority of the Juge Commissaire:—Held, that they may so sue in this country, unless the French law be shown to the contrary:—Held also, that the act of the two syndics sufficiently implied the absence or want of consent of the third, without showing his absence or want of

Evidence was given, that by French law two out of three provisional syndics may sue for the debts due to the bankrupt, and no contradiction being offered:— Held, that they may so sue in this

country.

The declaration averred, that a party, a Frenchman, was a bankrupt. The evidence was, that he was only " en etat de faillité," or insolvent:-Held no variance, as the English " bankrupt" does not appear identical with the French banqueroute. Alicon and Another, Provisional Syndies of the estate and effects of Beurain, a Bankrupt, v. Furnival, T. 1834.

ARBITRATION AND AWARD.

751

An attachment for non-performance of an award was resisted on the ground that an action was pending thereon; but it appeared that the party was in contempt before it was brought, by having before then refused to pay the sum

awarded. The Court gran attachment on the terms plaintiff's discontinuing the and paying the costs. Paull, M. 1833.

In showing cause agains for such an attachment, jection can be taken to the which does not appear on t

of it. S. C.

If the reference is of a and all matters in differen attachment will issue, altho award mis-reciting it be 1 ence of the cause only; for other matter in difference of which the arbitrator h notice, it would be a gre move to set aside the S. .C.

A rule to set aside the ce of an arbitrator should st grounds of the motion. a plaintiff did not give notice of attending an ar by counsel, and refused to to an adjournment except fendant's paying the costs meeting, the Court held not entitled to such costs the certificate made by the trator in his favour, and the case back to the arl Whatley v. Morland, H.

An attachment will not be for non-payment of mon suant to an award, and taxed thereon, till after th of reference has been mad of court. Chilton v. E. 1834.

During a trial a plaintiff: sel proposed to the def counsel that he should co a verdict for 100%, witho on either side. The def counsel conferred with de and his attorney, who Court, advising them to ac offer, but both told him

not be agreed to. However, the defendant's counsel took on himmaelf to consent to a verdict on the terms proposed, and it was entered accordingly. Held, that as neither ...the attorney nor the defendant opposed the making the order at the time, except in private conference with their own counsel, no new trial could be granted, even on mayment of costs, and a rule obtained for that purpose was discharged with costs. Wright and unother, Assignees of Jackson, a Bankrupt v. Sorsby, executor of Sorsby, E. 1834. 434 T., the tenant of F., was plaintiff

in an action of trespass against F.'s land agent for taking possession of T.'s farm, held under F. . H. acted as F.'s attorney in several suits pending between T. & F., and also for the land agent in the action of trespass which was substantially defended by F.'s counsel, . who held his general retainer, being claimed in that action by the attorney, H. At the trial, H. having advised with the defendant's counsel, consented to an order of nisi prius imposing certain terms on F. It was afterwards moved to set aside the order, which had been made a rule of Court, on affidavits of H. and F., that F. never gave authority to consent to settle any action or matter in difference between them, but the ... Court refused to interfere in favour of F. in a summary way. Thomas v. Henres and others, T. 1834. 335

In two actions, one on the case for disturbance of common, by inclosing a part, and the other in trespass quare clausum fregit, a verdict was taken generally for the plaintiff, subject to a reference by order of nisi prius of those causes, and of another action of

trespass not then at issue, as well as of all antecedent causes of action between the parties. H. a person, as whose servants the defendants had justified in some of these pleas, and who was not a party to either cause, was to be at liberty to become a party to this reference, as was any other person claiming right of common over the locus in quo; the object of the reference being declared to be that the rights of the commoners should be ascertained, secured, and regulated as concerned the parties thereto. In one action of trespass not guilty was pleaded, and a great number of issues were joined, claiming various rights of common. In the other not guilty, and numerous special pleas of justification had been pleaded, though no issues were joined at the time of the reference. The arbitrator awarded for the plaintiff in the action for disturbance of common. In the action of trespass which was at issue, he awarded that the defendants were not guilty of the trespasses; and in that which was not at issue, he awarded that the plaintiff had no cause of action against the defendants. He did not further notice the other issues, or specify any mode of terminating either cause; but proceeded, in pursuance of the terms of the order of reference, to declare in his award the rights of the parties in the causes to enjoy the common, and inclose certain woods in future.

He then directed the party who was the defendant in the first action, and plaintiff in the two others, to pay all the costs attending the reference and award. It was moved, first, to set aside the award as not final, in not having with certainty disposed of all the mat-

ters referred: secondly, to enter a verdict for the plaintiff on all the issues joined in one of the actions of trespass, except on that joined on the plea of not guilty: and thirdly, to enter a verdict in the manner directed by the arbitrator on the facts stated by him for the opinion of the court. Held, first, the award was final, and substantially disposed of all questions between the parties: secondly, that as the arbitrator had not been requested at the hearing of the reference to decide on each issue separately, or on those in particular which justified under title in II., who had not become a party to the reference, he was not bound to find any thing respecting H., and that the officer of the court might make up the roll, as if the causes had been tried by a jury who had been discharged from trying the special issues. Dibben v. Marquess of Anglesca; Marquess of Anglesca v. Dibben; Same v. Peyton, Dibben, and Lill, E. 1834. 926

Where a cause is referred to a barrister, with power to certify only, his certificate cannot be set aside on the ground that he has mistaken the law. Wilson v. King, E. 1834.

Quere, if an arbitrator, having only such limited power, may deliver in with his certificate a written paper, stating facts proved before him, so as to raise a question of law for the opinion of the court? S. C.

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ARREST.

Sec Affidavit of Debt.—Ambassador.—Evidence.—Privilege.

Under mesne process, requisites of.

Summers v. Mosely. 159

Where an arrest takes place for a

much larger sum than is afterwards paid into Court, yet if the plaintiff takes the smaller: of Court without proceeds ther in the cause, the de has no right to his costs, 43 G. 3. c. 46. s. 3. 1 Rhodes, H. 1834.

Affidavit of debt for so money, " for money lent a vanced, and interest there bad. Cullum v. Lecson, H

Quære, is a defendant : in a wrong christian name, & 1 W. 4. c. 12. s. 11., ent be discharged on motion? defendant having be rested for 33l., a verdict wa at the trial for that amous ject to the award of an ark who ordered the verdict to duced to 31. 3s. The de having moved for his cost 43 G. 3. c. 16. s. 3.: He the above facts made it inc on the plaintiff to "make pear to the satisfaction Court" that he had " rea or probable cause" for a the defendant, and in the of a clear statement to that the Court made the rule a Summers v. Grosvenor, H

A defendant against whom able capias had issued was rested, but a bail-bond wa and special bail put in a fected in due time: Hel not having been " arrest well as held to special bail no remedy for costs again plaintiff, on 43 G. 3. c. 46. he did not recover a sum for the defendant could be held and less than half of that for this arrest took place. I Pilling, H. 1834.

A defendant arrested on mescess in *Ircland* put in specthere, and was afterwards a in *England* in an action judgment obtained in the first action: Held, that he was entitled to be discharged out of custody, though the special bail put in in Ireland had been discharged for a defect in the affidavit to hold to bail. Gunn v. M'Clintock, E. 1834.

Before credit expired, see Strutt v.
Smith. 1003
Second on concurrent execution

Second, on concurrent execution.

Lewis v. Morris. 907

ASSUMPSIT.

See Money had and beckived.

ATTACHMENT.

See Costs.

Attachment for costs on award. See Arbitration.

For attorney's bill after taxation.

Attachment on an award. See Ar-BITRATION.

For non-payment of costs. See Costs.

ATTORNEY AND SOLICITOR. See Appearance.—Practice,

(Attorney.)

If less than a sixth is taxed off an attorney's bill, the Court may allow or return him the costs of taxation; and where very nearly a sixth was so struck off, the Court refused the costs. Baker v. Wills, H. 1834.

Where an attorney, who having been employed for the plaintiffs in a cause, had gone on as far as the issue and giving notice of trial, and had laid the facts of the case before counsel for his opinion, was afterwards discharged by his then clients, but not for misconduct; the Court refused to restrain him from acting for the defendant in the same cause, there being no affidavit by the plaintiffs or their solicitor

that the attorney had, while in their employment, obtained a confidential knowledge of particular facts, which it would be prejudicial to their case to communicate to the defendant, or that the case which had been laid by him before counsel contained facts, the disclosure of which by him to the defendant would have a similar effect. Johnson and another, Assignees of Cochrane, a Bankrupt, v. Marriott, M. 1833.

The contract of an attorney or solicitor retained to conduct or defend a suit is entire and continuing. viz. to carry it on till its termination, and can only be determined by the attorney upon reasonable notice. So that in an action by an attorney for business done in a suit more than six years before the commencement of the action, the Statute of Limitations 21 Jac. 1. c. 16. s. 3. is no bar when no such notice was given, and the suit did not terminate till within six years before the action was brought. Harris and another, Executors of the Will of Wilson, deceased, v. Osbourn, E. 1854.

A person who had been admitted an attorney before 11 G. 4. and 1 W. 4. c. 74. (23d July 1830,) and had taken out his certificate to practise in a court of great session in Wales, but had ceased to practise, and was not "then practising:" Held that he was not entitled to be involled an attorney of a superior court under s. 16. of that act.

Ex parte Garratt, H. 1834. 282
An attorney sued jointly with a person not privileged from arrest, does not, since 2 W. 4. c. 39. s. 4. lose his own privilege by that circumstance; for he may now be served with a copy of the capias on which the other defendant is arrested; and where an attorney

so served had been arrested and gave bail, the Court ordered the bail-bond to be given up to be Pitt v. Pocock and cancelled. Biggs, gent. one &c. M. 1833. 85 Costs of drawing and copying bill. 310 Taxation of bill. 364 Privileged from being witness. Bates v. Kinsey. 626 Suing without authority. Mudry v. Newman. 1023 Authority to. Drake v. Lewin, 730; Thomas v. Hewes, 335; Hewitt v. Melton, 1003.

BAIL AND BAIL-BOND.

When a trial has not been lost, the Court will stay proceedings on a bail-bond, if the defendant has since put in and perfected bail, on his taking short notice of trial, but without affidavit of merits, or that the application is made at the instance of the defendant, the sheriff, or the bail. Walker and others v. Bourne, M. 1833.

Where a bail-bond was forfeited for want of justification in due time, and an assignment of it was written for from town before bail was finally allowed, the Court set aside the proceedings on the bail-bond with costs to be paid by the plaintiff, minus those of the assignment which had been occasioned by the defendant's default. Ellis, Assignee of Sheriff of York, v. Bates and others, M. 1833.

Where a defendant is arrested in the vacation between 10th August and 24th October, and the sheriff, on being ruled to return the writ, returns cepi corpus, the defendant may put in special bail in that vacation, by 2 W. 4. c. 39. s. 11. though before they are perfected a judge's order be made, pursuant to Reg. Gen. 3 W. 4. calling on the sheriff to bring in the body

within four days, by put and perfecting special bai v. Sheriff of Middlesex, in W v. Wright, M. 1833.

A bail-bond dated the day or an arrest took place, and sl have borne that date on th though not executed till th was conditioned that the ant should within eight da the date thereof, inclusive day of such date, cause bail to be filed in the Exc in a certain action, &c. ac to the form and practice said Court: Held, that in p tions on 23 H. 6. c. 9. for ing to take bail, a bail-bo such a condition did subst comply with the Uniform Process Act, 2 W. 1. c. 39 by the form in Schedule No quires a defendant, within days after executing a ca him, to cause special bail put in in the action at the of the plaintiff's proceeding the sheriff or on the bai Evans, q. t. v. Moscley, Sh Salop, H. 1834.

A notice of bail need not stathe bail-piece, &c. has been with the filacer at the Excoffice. Wigley v. Edward 1834.

An informality in a no bail does not entitle the p to take an assignment of the bond. S. C.

If it is made the subject of a for giving up the bail-bond cancelled, that the defends arrested by a wrong nam affidavit should be entitled defendant's right name "s the name of" (the wrong Finch v. Cocker, H. 1834.

Proceedings taken on the bawere stayed on the terms should stand as a security. sequently the principal a

bail became severally bankrupt, and obtained their certificates. On motion to have the bail-bond delivered up to be cancelled, and to enter an exoneretur on the bailpiece, Held, that as the bankruptcy and certificates of the bail were not disputed, the Court would relieve them under the powers of 4 & 5 Ann. c. 16. s. 20. by staying proceedings on the bailbond; though they would not order it to be delivered up, as the plaintiff was entitled to keep it in order to claim to prove in respect of it under the flats; and the Court moulded the rule accordingly, without calling on the bail to pay Slatter v. Scott, H. 1884.

Debt on bail-bond. See PLEADING.

BALLOT.

Charlesworth v. Rudgard. 822

BANKRUPT.

See COVENANT IN LEASE.

In an action by a messenger to a commission of bankrupt, against the assignee appointed under 6 G. 4. c. 16. to recover the costs of advertising a meeting of creditors, and of hiring a room for them to assemble in, it is sufficient to prove the plaintiff's appointment, and that the expenses incurred by him were reasonable, without proving express employment or recognition of him as messenger by the assignee. Hamber v. Purser, M. 1833.

A person who had been discharged under an insolvent act in 1815, became bankrupt in 1829 (3 G. 4.) and obtained his certificate, but paid less than 15s. in the pound. He afterwards became possessed of property: Held, that his assignees under the commission were entitled to recover under s. 127

of 6 G. 4. c. 16. which has for that purpose a retrospective effect, notwithstanding the interest previously vested in the assignee under the insolvent act. Elston and others, Assignees of Elston, a Bankrupt, v. Eliza Braddick, H. 1834.

(Order and Disposition.)

G. R. S. having advanced money to M. received from him, by way of security, an assignment of his equitable life interest in certain stock, standing in the names of three trustees under a marriage settlement, and in a mortgage vested in the same trustees. solvency of M. becoming doubted, one of the trustees, and a relation of G. R. S. spoke to him on the subject, when G. R. S. in the course of the conversation, and without any view of giving validity to the security he held, told him that he held the above-mentioned assignment as a security for his advances. M. having afterwards become bankrupt, Held that this statement, though made to a person who was not the acting trustee, sufficed to prevent the stock and mortgage from being in the order and disposition of M. at the time of his bankruptcy, and consequently from passing to his assignees. G. R. Smith v. Smith and others, M. 1833. Effect of certificate in discharging him from costs. 652 Assignees, use and occupation by. Jacobs v. Phillips. 673

Payments to, with reference to 6 G. 4.
c. 16. s. 82. Cromfoot v. London
Dock Company. 967
Depositions. 531

BANKRUPTCY. See Supersedeas. Stephens v. Pell, 2.

BILLS AND NOTES.

See PRACTICE (Rule to compute.)—
PLEADING.

A bill having been originally accepted, payable at the acceptor's own house, King's Road, Chelsea, was afterwards altered by him at the instance of the payee, and was made payable at Mr. Bland's, Great Surrey Street, Blackfriars: Held, in an action by payee against acceptor, that the alteration was immaterial, and did not vitiate the bill. Walter v. Cubley, M. 1833.

Where a bill-broker receives a bill from his customer merely to get it discounted he has no right to mix it with bills of other customers, and pledge the whole in a mass, in order to secure a loan of money to himself. Still less has he a right to deposit bills received merely for the purpose of discount, as a security, or part security for money previously due . from him; and the pawnee receiving the bills from him with .. reasonable ground of suspicion, à fortiori with knowledge of the limited authority on which he held them, cannot detain them against the customer who deposited them with the bill-broker. Haynes v. Foster, M. 1833.

A subscribing witness to a promissory note expressed to be payable on demand for "value received," proved that just before it was signed, the maker was requested by the payee to give it him in lieu of a legacy left him by the maker, who was then very ill, for the trouble he would have in acting as his executor. The payee having died before the maker, Held, that the payee's executors could not recover on the note against those of the maker. Solly and

others, Executors of Chandler, Hinds and another, Executors Underdown, H. 1834.

A bill was drawn on the consigne of a cargo of coals shipped to R chester by the broker at Newcast who had effected the purch there. That bill was returned the payees, the coal owners, t accepted, on account of the de being too short. The broker ha ing directed the payees to propi another bill at a longer date, th did so, and sent it to his countir house in N. for his signatu The broker had in the meanti lest Newcastle in pecuniary e barrassment, and his brother, defendant, had come to the cou ing-house to investigate his affai The defendant, in the absence his brother, and at the request a for the convenience of the pla tiffs, signed the bill they had p pared without qualification of liability: Held, that he was p sonally liable as drawer to pay bill. Somerby and others v. J. Butcher, H. 1834. A bill accepted payable at a Low

bankers, indorsed in blank by payee, was indorsed over by si sequent holders, who added the words, "In need Smith, Payne Co." to their indorsement. It 1 afterwards indersed in blank veral times, and at last to Liverpool bank, who indorsed specially, " Pay Messrs. Ten and Farley or order." Terney : Farley indorsed in blank to pla tiff, writing thereon " Thor Terney and Farelley." It afterwards indorsed in blank several others, and when due duly presented at the Lon bankers, at which it had b made payable. The answer was advice." On the same da was presented, according to previous memorandum, to Sa

Payne, & Co. London bankers, who refused to pay it, on the ground of the mis-spelt indorsement of Terney and Farley. The case stated between the parties admitted the custom of London bankers to be to refuse payment of all bills, even those accepted by themselves, if the indorsement be not correct to a letter. Due notice of dishonour being given to the plaintiff, the bill was returned to him, and he gave due notice of dishonour to the Liverpool bank, who subsequently pointed out the irregularity to the plaintiff. their advice he sent the bill to Termey and Farley in Ireland to rectify, and indorse it Terney and They did so, and the bill Farley. was sent up to Smith, Payne, & Co. who refused payment as overdue: Held, that the bill having been regularly presented and dis-honoured, and due notice of dishonour given to the Liverpool bank, they were liable to pay the amount to the plaintiff. Leonard v. Wilson, E. 1834. 416

The cases enumerated by 3 & 4 Ann.
c. 9. s. 1. in which promissory
notes cannot be assigned, are instances only. Dickenson v. Teague,
E. 1834.
450

Suing one party to a bill after paid by another. Monck v. Bonham.

Pleading want of consideration.

Easton v. Pratchett. 472

In assumpsit by the indorsee against the indorser of a bill of exchange, it is a bad plea to plead that the action was commenced before a reasonable time had elapsed for the defendant to pay the bill after notice to him of the non-payment; for the cause of action accrued against the defendant immediately on his receiving the notice of dishonour. Sigger v. Lewis, T. 1864.

Quere, if a tender promptly made within a reasonable time after such notice received, would be a defence to an action even for nominal damages only for non-payment in the interim? S. C.

payment in the interim? S. C. If a notice of dishonour is sent by post on the day on which the party ought to receive it, the onus is on the vendor to prove affirmatively that the letter was put in in time to reach the party that day, according to the course of the post. Fowler v. Hendon, T. 1834. 1002

Where a promissory note was made payable to D. or bearer on demand at sight, it was held that the latters words could not be rejected, and that no action could be maintained without proving presentment for sight. Dixon v. Nuttall, E. 1884.

CARRIERS.

A case containing a looking-glass of above 10l. value, marked on the outside "Plate Glass," &c. and directed to "Col. Shedden, Elms, Lymington," was delivered at the office of the defendant, a common carrier in London, and booked there to go by his waggon. Its size was considerable, and its weight five cwt.; a notice was fixed in the carrier's office, pursuant to 11 Geo. 4. and 1 Will. 4. c. 68; no price was paid for its carriage, but for booking only; no declaration of its nature or value was made on behalf of the plaintiff pursuant to section 1 of the act; nor was any increased rate of charge for the greater risk and care incurred in its conveyance, or any engagement to pay the same asked or accepted by the defendant's servant on receiving the package. It arrived in Lymington, and was forwarded from thence on a narrow truck without springs, along a smooth road to the Eine.

1003

where it was discovered to be broken. The jury found negligence, and gave the plaintiff a verdict for the value of the glass: Held, on motion to enter a nonsuit, that the nature and value of the article in the case not having been declared at the time of delivering it at the defendant's office, and gross negligence not being found by the jury, the carrier was protected by the express words of 11 Gas. 4. and 1 Will. 4. c. 68. s. 1.

CERTIFICATE.

See Arbitration and Award.

CHARGING IN EXECUTION.

Hewitt v. Melton.

CHURCHWARDEN.

A churchwarden cannot, by ordering repairs to be done to a parish church, render his co-churchwardens liable without their consent, and if he does he is personally liable. Northwaite, Executor, Ac. v. Bennett, H. 1834. 236

CLERK

To turnpike trustees, liability of. Emery v. Day. 696

COGNOVIT.

See Error.—Practice (Cognovit.)

COMMENCEMENT OF SUIT.

Dickenson v. Teague. 450

COMMISSIONER UNDER LOCAL ACT.

A local act directed that no person should be capable of "acting as a commissioner in execution thereof, in any case wherein he should be personally interested in the matter in question," and that any person who should so act as a commis-

sioner, being so disqualified, sho forfeit 100l. The commission were in part elected by paris within a certain precinct. order had been made by them constructing a footway in a p ticular manner along the front of the defendant's, among oth premises. The defendant, who afterwards elected a commission attended at a special meeting the commissioners, and first mo to rescind the order as to all cept his own premises, which negatived. On a motion be made to alter the order, by add ing a less expensive mode of p ing, he supported the proposit in a speech, and took an ac part in the discussion, and in posing the original order. then proceeded to the ballot w the other commissioners. In action of debt for the pens there was a count charging the fendant with acting as a comt sioner in a matter where he personally interested, and vot accordingly. Another count of charged him with acting as s commissioner in a matter in wi he was personally interested. jury found that the defendant not vote on the occasion in qu tion, and gave him a verd Held, that he did not act a commissioner in proposing the scinding the order, except as his own premises; but that th was evidence that he had "act as a commissioner by address the meeting on the motion for tering the order, and by taking active part in the discussion; that as the only question left them was, whether he had vo and not whether he had acted: commissioner in any other man he was entitled to a new t Charlesworth v. Rudgard, T. 1

....

335.06

16.19

The evidence of a person who proceeds to a ballot is admissible as to the share he personally took in it. S. C.

Semble, the addressing commissioners of paving by a commissioner in complaint of a grievance affecting him individually, is not "acting" as a commissioner. S. C.

COMMON. See Woods.

COMPOSITION.

By agreement not under seal between the plaintiffs and other creditors of the defendant, with the ...defendant and his surety, the latter agreed to pay them a composition i of 15s. in the pound at two fixed ... dates, and in consideration of the creditors agreeing to discharge the defendant from all his debts and demands on receiving the 15s. in the pound, the surety undertook to pay a sum down in part payment of the first instalment, and to accept a bill drawn by the defendant in part payment of the second; the creditors thereupon agreeing "to exonerate and discharge the defendant on payment of the said 15s. in the pound." was next agreed that some bills (and a note) which if paid would have satisfied the residue of the composition money, and which had been indorsed and handed over to the plaintiffs by the defendant before the composition, " should be considered as part payment of the said 15s. in the pound:" Held, that the defendant still remained liable on such of those securities as were not paid at maturity by other parties to them. Constable and another v. Andrew, H. 1834. 206

CONCURRENT WRITS.
See Lewis v. Morris. 907

CONFIDENTIAL COMMUNI-CATION.

See LIBEL.

CONTINGENT REMAINDER.

See DEVISE.

CONTINUANCES:

COPY OF AGREEMENT.

If one of the parties to a cause has the only copy of his agreement with his adversary, he should give him a copy, when applied for, without imposing terms, or a judge at chambers will compel him to do so. Reid v. Coleman, H. 1824.

COPYHOLD.

See Money had and received.

COSTS.

After a defendant has consequently to pay his own costs, it is too late to move that the plaintiff's attorney do pay his costs of defence on the ground that the plaintiff never authorized him to sue the defendant. Hammend v. Thorpe, T. 1834.

The trial of a cause was postponed by order of a court of nisi prius, on the defendant's application, on the terms of his paying the plaintiff his costs of the day. The order of nisi prins was made a rule of court, and the costs were taxed. after which the defendant became bankrupt: Held, that he was discharged by his certificate, as to these interlocutory costs so ascertained before the bankruptcy. Jacob v. Phillips, T. 1834. 652 A certificated bankrupt cannot be discharged from arrest for a debt covered by his certificate, till

1040 INDE:

it has been inrolled pursuant to 6 G. 4. c. 16. s. 96. S. C.
By the proper construction of Reg

Gen. Hil. 2 W.4. No. 74. a defendant is not entitled to general costs of issues found for him, including the witnesses, or to the costs o witnesses whose testimony was only in part applicable to those issues, but the plaintiff has a right to general costs in respect of the issues found for him. Lardner v.

Dick, H. 1834. 299
Attachment will be issued for not paying costs in ejectment on the master's allocatur after judgment as in case of a nonsuit, though no subpoens solvas has issued against

the nominal plaintiff. Doe d. Floyd v. Roe, M. 1833. 85 Issues were joined in fact and in law, and notice of trial of the former given; but the plaintiff having

gone to trial, paid the costs of the day on motion in the subsequent term. In that term the demurrer was argued, and the defendant had leave to amend on payment of costs. The master disallowed all the plaintiff's costs of the paper books and briefs which related to the issues in fact, and was held

right. Jones v. Roberts, executrix, H. 1834.

In an action on an attorney's bill, the bill had been delivered, but an order for better particulars, by adding the dates, was granted, on defendant's paying for the same. The plaintiff charged for drawing as well as copying the

Where in the copy of an attachment for non-payment of costs, pursuant to the master's allocatur, which was served on the defendant Calrert, the final t of his name was omitted, and that of the master was stated to be Day instead of

amended particulars of the bill. The master allowed the copying only, and was held right. S. C.

plaintiff has subsequently gone to trial, obtained a verdict and signed final judgment, if the cause is still in existence from the plaintiff's not having taxed his costs or obtained the fruits of execution. Redit v. Lucock, H. 1834. Costs of taxing attorney's bill.

ATTORNEY.

Costs in action for mesne profits. See MESNE PROFITS.

Costs of several counts. See SLAN-

Costs to defendant when arrested for larger sum than recovered. 216, 222, 281.

Costs payable by executors for not proceeding to trial. Security for. See SECURITY.

COUNTS.

Superfluity of, subject of motion, not demurrer. Gardner v. Bowman. 412

COURTS OF REQUESTS.

The London court of requests acts 3 Jac. 1. c. 15., 14 G. 2. c. 10., 39 and 40 G. 3. c. 104., confer jurisdiction over liquidated demands, though there are special counts; but not in cases where unliquidated damages are sought to be recovered; as on a count for not returning goods unsold. Postan v. Masser, E. 1834.

CREDIT, see 315.

Simpson v. Penton and Strutt v. Smith, 1002.

See SALE OF GOODS.

CROSS ACTION. See PLEADING.

Chappel v. Hickes.

43

CUSTOM OF THE COUNTRY. See Use and Occupation.

COVENANTS.

See EXECUTION.

COVENANT IN LEASE.

It is no defence at law to an action on an indenture of lease by the trustee of a party who has become bankrupt, that the defendants, the lessees, have performed their covenants with the assignees of the cestui que trust. Daniel Mallet Britten, administrator of J. Smmders, v. Daniel Britten, Perrot, and Watts, E. 1834. 47.3

DEBT, ACTION OF.

In an action of debt on a judgment of an inferior court, the declaration is bad on demurrer, if it does not contain an averment that the cause of action arose within the jurisdiction of the court below: it is not enough to allege that the plaintiff recovered his damages within that jurisdiction. Read v. Pope, E. 1894. · **40**3

The words "undertook and agreed to pay" in a quantum mertuit count, do not necessarily import the form of action to be assumpsit, but are good in debt. Gordner v. Bowman, E. 1834, 412

In an action of debt it is immaterial that the aggregate of the sums claimed in several counts exceeds the amount claimed in the queritur. S. C.

No objection on the ground of superfluity of counts, can be taken on demurrer, but it must be the subject of motion. (Reg. Gen. Hil. 4 W. 4. No. 6.) S. C.

DE INJURIA.

See PLEADING.

DEMISE.

Occupation not evidence of.

780

DEMURRER.

. See Pleading.—Practice.

Arguing. See Darling v. Gurney. 2

DEPOSITIONS.

Before commissioners of bankrupt.

DETINUE.

A plea in detinue, that plaintiff did not deliver the goods to the defendants, is bad on general demurrer. Walker v. Jones and others, E. 1834. 915

DEVISE.

R. B. devised freehold premises to his wife during her life or widowhood, and after her death or marriege, to his nephew R. B. R. for .life, and from and after his decease "unto and equally between all and every the children of his said nephew R. B. R. lawfully begotten, their heirs and assigns respectively, as tenants in common," if more than one, and if but one, then to such only child, his heirs and assigns; but in case there should be no child or children of his said nephew R. B. R. living at the time of the decease or marrying again of his the testator's said wife, then he devised over to his executors in trust for other persons. residue was devised to certain other persons. By codicil dated and executed on the same day as the will, duly attested so as to pass real estates, the testator directed "That neither the said R. B. R. nor any or either of his issue, shall, by virtue of this my will, take or be considered as entitled to a vested interest or interests, unless and until they shall respectively attain the age of 21 years." R. B. R. the nephew attained 21, married, had children in the lifetime of the testator's widow, and survived

her, as did his children. At death he entered into possess of the devised estate, and at wards died, leaving five child surviving him, all infants; having by will devised all freel estates of which he might seised, and over which he m have a disposing power, to cer persons, upon trusts mentione the will: Held, that the dev substituted by the will for the previously made to the child became void, the events cont plated not having happened; that the estates devised to children by the will being rend ed contingent by the codicil, fa of effect for want of a particular estate of freehold to support the at the death of R. B. R.; so the fee passed by the will of testator's heir at law. Russe Buchanan and others, E. 18

DIRECTIONS TO TAXING (FICERS.

DISCLAIMER.

Land belonging to the father of lessor of the plaintiff had be held by his leave, and under h by the father of the defends from 1812 to his death in 18 on an understanding that a le was to be granted. After t event the land remained in poss sion of the defendant till the de of the father of the lessor of plaintiff in 1829, and from t time till the ejectment deliver No claim or payment of rent acknowledgment of tenancy either the defendant or his fat No demand of was shown. possession from the defendant shown; but in order to show t the defendant had determined tenancy by disclaimer, the les

of the plaintiff put in a letter from the defendant and two more from his agents. In the first, the defendant stated, that the facts not being within his knowledge, he had referred them to his solicitors, and had requested them to communicate with the lessor of the plaintiff. The second letter to him from the solicitors ran thus: —The defendant has given us a letter from you on the subject of some ground you state to have been let by your father in 1811, and which has ever since been in the possession of his lordship's family. We will thank you to let us have the proofs that it was not the late lord's own. other letter from one of the solicitors requested further information as to the late Mr. Lewis having a right to let the ground to Earl C.: Held, that those letters did not amount to an admission of an antecedent disclaimer, and that if they did, they would not be sufficient for that purpose, being written after the day of the demise laid in the declaration.

The letter of the defendant did not authorize his solicitor to bind him by any disclaimer. Doe d. Lewis v. Earl Cawdor, T. 1834.

Semble. If an admission of a disclaimer is made after the day of the demise, it must recognize a disclaimer as having been made antecedent to that day, or it will not determine a tenancy. S. C,

DISTRESS.

Withdrawing. See Stephens v. Pell. 2

For poor-rate. Priestley v. Watson. 916

DUPLICATE ORIGINALS. 751

See Evidence.

VOL. IV.

EFFECTS.

See Lewis v. Rogers.

372

EJECTMENT.

Sec Mesne Profits.

A declaration in ejectment must begin and conclude with the quo minus clauses, as before 2 W. 4. c. 39. the uniformity of process act, the general rules of Mich. 3 W. 4. No. 15. not being applicable to any but actions merely personal. Doe d. Gillett v. Roe, T. 1834.

An ejectment was brought and notice of trial given in December for the next assizes, but without paying the taxed costs of a former ejectment, brought for the same premises by the defendant against the lessors of the plaintiff, in which judgment had been had against the casual ejector, and possession delivered to the defendant. A rule afterwards obtained for staying the proceedings in the second ejectment till such costs were paid, together with those of an action for mesne profits, was made absolute. Such a rule will not be enlarged in order to set off the costs claimed against any which the lessors of the plaintiff may become entitled on the trial of the second ejectment. (See Reg. Gen. Hil. 2 W. 4. No. 93.) Doe d. Maslin v. Packer, H. 1834.

ENTRY.
See Evidence.

ERROR.

When a defendant, against whom judgment had been signed on a cognovit, in which he agreed not to bring a writ of error, or delay execution, brought a writ of error notwithstanding: Held, that the allowance of that writ of error was

no supersedeas, and that he might be charged in execution notwithstanding. Semble otherwise if there is a release of errors. Best v. Gompertz, H. 1834.

ESCAPE.

By the practice of a borough court its process was directed to the serjeant-at-mace, naming him, and to one or more persons also named, who are appointed by him to execute the process, having given him security to account to him as well for all fees received as for acts done in their offices. Thev attend at his office in order to receive process, and are dismissed by him at pleasure. A ca. sa. which had issued, directed to "T. P. serjeant-at-mace of the borough, and also to A, L." not subjoining "his officer," was executed by A. L. without any warrant, which, by the practice, was never issued. Parol testimony was admitted to show the above facts relative to the officers' appointment and situation. It was also proved that when parties wish process to be executed by a person, not such officer, the serjeant-at-mace is applied to, and specially indemnified. Bail-bonds are taken in his name, and he is served personally with rules to return writs. The returns are made in the names of the officers actually executing them, but attachments for not doing so, &c., issue against the serjeant-at-mace: Held, in an action for a voluntary escape, that A. L. was the officer of the serjeant-at-mace, who was therefore responsible for his acts in the execution of process. Morris v. Parkinson, T. 1834. 700

EVIDENCE.
See WITNESS.

By 5 Geo. 4. c. cxxv. (a local act,)

no drain within a certain dist described by the act was to arched over by "any person wh soever" without the consent certain trustees. A surveyor was employed by a private in vidual to superintend the erect and arching over of a drain on property within that district, is "person" within that act. Was ward v. Cotton, T. 1834.

By the concluding section it is enacted, that the act should deemed and taken to be a pull act, and should be judicially taken notice of as such without be specially pleaded: Held, that printed copy was admissible evidence without proof that it is been examined with the part mentary roll, or printed by king's printer. S. C.

The assignee of a reversion sued assignee of a term for rent. I plaintiff's attorney was called his client to prove the execut of the deed of assignment to h of the reversion. On cross-en mination, no objection being ma as to his privilege, he deposed the there had been a subsequent de between the same parties relati to the demised premises. He a said that he had it in Court, ! objected to produce it on 1 ground of his privilege. No 1 tice to produce it had been give The defendant contended that was entitled to give secondary e dence of the contents of the debut did not state the nature or fect of the proposed evidenc Held, that such evidence was n Bate v. Kinsey, admissible.

A written memorandum of an arre and of the place where it occurre made by a sheriff's officer, co temporaneously with effecting t arrest, sent immediately to t sheriff's office, and there filed the course of business, is not admissible evidence of the place at which the arrest took place after the death of the officer, in an action between third persons. Chambers v. Bernasconi and others, T. 1834.

Depositions taken before commissioners of bankrupt, and inrolled by the assignees according to 6 Geo. 4. c. 16. s. 96. are not evidence against them in an action brought to dispute the commission, by disproving the act of bankruptcy on which it is founded. S. C.

A trader and small farmer being embarrassed in her affairs and pressed by a creditor, assigned "all her effects, stock, books, and bookdebts," for the benefit of her creditors, and at the same time dictated a list of persons whom she stated to be creditors of her es-The assignee having dealt with the property after her death, was sued by one of her creditors as executor de son tort: Held, that the list was evidence as part of the transaction of the assignment in order to establish the bona fides of it, and so justify the defendant's intermeddling. Lewis v. Thomas Rogers, Executor of Elizabeth Rogers, deceased, T. 1834.

Held also, that cattle on the farm passed by the word "effects." S. C.

EXCISE INFORMATION. See FORMA PAUPERIS.

EXECUTION.

The attorney for a defendant who was in custody on final process, obtained the consent of the plaintiff's attorney not to charge him in execution in the term in which that step ought to have been

taken, on the false representation that he had the defendant's authority and consent to take no advantage of his not being charged in execution till the next term. defendant's attorney signed an undertaking to that effect, which, however, did not state that the proceedings were stayed at the defendant's request, pursuant to Reg. Gen. of this court, Hil. 26 & 27 The defendant was not G. 2. charged in execution till the next term, and was afterwards discharged on the ground of the above omission in the undertaking, An action having been brought by the plaintiff against the defendant's attorney for damages accruing from the defendant's discharge by the false representation of the defendant, it was held that it could not be maintained, for the damage laid arose from the informality of the undertaking. Hewitt \mathbf{v} . \mathbf{W} . 1003 Melton, E. 1834. Two writs of ca. sa. were issued at one time into Anglesea and Car-The debtor was arnarvonshire. rested in Anglesea on 1st November, and having paid debt and costs to the sheriff, was discharged. The next day he was arrested in Carnarvonshire on the other ca. sa., and was detained in custody till the 15th, when the debt and costs were paid over to the creditor's attorney, several days after he had been acquainted with the previous facts. The debtor then sued the creditor and her attorney in case for malicious non-feasance, in not giving notice to the sheriff of Carnaroonshire that the writ issued into Anglesea had been executed or the judgment satisfied, and that the writ directed to him was not to be executed: Held, that in the absence of proof that before the second arrest, any notice had reached the creditor or her attorney of the first arrest, or of the payment of the debt and costs, or that at any time before his discharge the plaintiff had applied to either for a countermand of his imprisonment, which had been thereupon maliciously withheld, he could not maintain the action. Lewis v. Grace Morris and Lloyd Roberts, E. 1834.

Scmble, the discharge by the sheriff of Anglesea without the consent of the plaintiff was illegal.

S. C.

Semble, also, that the second arrest might have been set aside on application to a judge. S. C.

EXECUTORS AND ADMINISTRATORS.

See Use AND OCCUPATION.

Where in an action commenced by an executor before 1st June 1833, he sued necessarily in his representative character, and declared only on promises to his testator in his life-time, judgment as in case of a nonsuit was obtained in Norember 1833, but the executor took no step after 1st June in that year: Held, that he was not liable to pay the whole costs of the cause, but only such costs as had been occasioned by his own negligence in not proceeding to trial. Pickup and another, Executors, v. Wharton, H. 1834. 221

The expenses which executors will be justified in incurring about the funeral of the deceased when his estate turns out insolvent, must be reasonable, according to the circumstances of each particular case, with reference to the testator's condition in life. Edwards v. Edwards, Administratrix with the Will annexed of Henry Edwards, deceased, E. 1834.

Where in an action against the personal representative of the vo-

luntary grantor of an plene administravit was the defendant claimed as diture of 103l. on the fithe deceased, who die 2987l., but whose rank is not appear. S. C.

Semble, that that sum of be allowed to the person sentative against a claim arrear on the annuity deed

Nor can items for expression expressions and for costs ments brought to recove be allowed. Nor a pay the personal representative the assets on account of due on a mortgage create father of the deceased be estate descended to the S. C.

Assumpsit against executri work and labour done for Plea, that a judge been obtained against the in his life-time, and that fendants had fully admi &c. except as to chattels value, not sufficient to sa judgment. Replication, testator paid a large sun 2001., in full satisfaction charge of the debt recove of the judgment, and that fendants deceitfully and intention to deceive and the plaintiff of his damag deferred and still do de curing acknowledgment (faction to be entered of debt, or to be released th and still permit the said is thereon to remain in ful Rejoinder, traversing the of the said sum in full sat and discharge of the covered, and of the judgm held bad on demurrer; material fact to be trave

the keeping on foot the judgment by fraud; whereas the payment in satisfaction was immaterial and not traversable, being mere inducement. Jones v. Roberts and another, Executrixes, M. 1834. 48 An executor who pleads non assumpsit and plene administravit, is entitled to the general costs of the

cause, if he succeeds on the latter plea. Iggulden v. Terson, H. 1834.

Semble, no affidavit is necessary to substantiate between counsel what terms were offered or accepted by them on the hearing of a cause. S. C.

Two of four co-executors proved the will, and sued for goods sold and delivered, and work and labour done by the testator. The other two released to the defendant, who pleaded the release puis darrein continuance: Held, that before the Court would take the plea off the file, the plaintiff must make out a case of fraud. Herbert and another, Executors, v. Pigot, bart. H. 1834.

Where an executor agrees with a legatee to allow him interest on his legacy if he will permit it to remain in his hands, it becomes a loan to the executor, for which he is personally liable at law, and cannot plead plene administravit in bar to an action by the legatee. Wasney, Clerk, Executor of Andus, v. Earnshaw, T. 1834.

In covenant against an executor, sued as an assignee for breaches of covenants to pay rent and to repair, incurred in his time, it was pleaded, that the defendant was executor of the lessee, that the premises yested in him as such executor only, and not otherwise, that the profits of the demised premises at the time he became executor, and since that hitherto, were less than the rent reserved,

and that the defendant had paid to the plaintiff before commencing the suit 2551., being all that remained in his hands of the said profits by him at any time received therefrom, and that he had never since received any such profit: Held on special demurrer, to be insufficient, for not stating that the defendant had no other assets of the deceased which had come to his hands as executor to be administered. Reid v. Tenterden (Lord). M. 1834. 111

See Remnant v. Bremridge, 8 Taunt. 191; Tremeere v. Morison,

1 Bing. New C. 89.

In two other pleas, the defendant added to the above statement, that the sum of 2551, so paid before the commencement of the suit was all the money which remained in his hands, not only on account of the profits of the pre-mises received by him, but of all the goods and chattels which were of the deceased which had come to his hands to be administered; and that he had not at the time of the commencement of the suit, or at any time since, any profits or goods and chattels of the deceased in his hands to be administered: Held, on special demurrer, insufficient, for not stating that during the interval between the payment of the 255l. and the commencement of the suit, defendant Reid v. Tenterden had no assets. (Lord,) M. 1834.

Semble, an offer by an executor to a lessor to surrender to him a lease granted to his testator, is an answer to an action of covenant against him as assignee for breaches of a covenant to repair, as to all breaches accruing after that offer. S. C.

EXTENT.

were less than the rent reserved, A fiat for an extent having been

granted more than a year before application for an extent, the Court refused to grant a rule that an extent might issue tested of the day on which the fiat bore date.

Rex v. Maberley, T. 1834. 345

FALSE IMPRISONMENT.

Where the master of a school refuses to deliver up the person of a boy to his parent, on account of a quarter's schooling not having been paid according to contract; but there is no evidence that the boy was present at the refusal, or knew that his mother had wished to take him home and been refused, or was in any way restrained though kept at school during the Christmas fortnight; an action for false imprisonment cannot be maintained by him. Daniel Herring, an Infant, by W. H. Kimber, his next Friend, v. Boyle, T. 1834. 799

FOREIGN LAW.

Evidence of. Alivon v. Furnival. 751

FORFEITURE.

A termor, after deserting the demised premises, delivered up the possession of them, with the lease, to a party who claimed by a title adverse to that of the landlord, with intent to assist him in setting up that title, and not that he should hold bona fide under the lease: Held, that the term was forfeited by the act of betraying possession. Doe d. Ellerbrock v. Flynn, T. 1834.

FORMA PAUPERIS.

A defendant in an excise information may defend in forma pauperis on an affidavit that he is not worth 51. over and above his apparel, and without certificate by counsel that he has merits. But such a defendant is not entitled to a copy

of the information, and can chave it read over to him by officer, in order to his plead then or at a future day. Attor General v. Duffy (Revenue Ca H. 1834.

FRAUDS, STATUTE OF.

A. went to B. on 20th July, to t with him for an engagement farming bailiff. B. handed to ! a paper on which the propo terms of service were written, it was not signed by either pa A. asked when he was to con B. said on the 24th. A. made objection, but took the paper as with him, and came into the vice on the 24th: Held, that I was an agreement on the 20th a service for a year from the 24 and as the memorandum was signed by the party to be charg it was not valid by section 4 the statute of frauds, 29 Car c. 3. Snelling v. Lord Hundi field, T. 1834.

The plaintiff and defendant went gether to the shop of A., . knew the plaintiff but not the fendant. The plaintiff having troduced defendant, said in presence to A. " Have you! objection to supply this gentlen with some furniture? If you w I will be answerable for it." asked how long credit would Plaintiff replied, wanted? will see it paid at the end of months;" adding, it would about 40l. or 50l. A. sent go A. sent go to the defendant's house, and payment having been made by defendant within six months, plied to the plaintiff for the amou without previously requesting fendant to pay. The plain having paid the amount: He that a jury was well warranted finding that the credit was si

by A. not to defendant, or to him and the plaintiff jointly, but to the plaintiff, whose promise to pay was therefore original, and not collateral only, so as to require any writing within the statute of frauds, 29 C. 2. c. 3.; and therefore that the plaintiff might recover the amount against the defendant as for money paid at his request. Simpson v. Penton, H. 1834. 315

Semble, the circumstances of each case must be considered in deciding whether a contract be original or collateral. S. C.

FRENCH BANKRUPT, 751.

GAME. See TRESPASS.

GUARANTEE.

The following guarantie was given by the defendant in Jan. 1825 to certain bankers:- " Please to open an account with, and honour the checques of H. B. on Mill account, for whom I will be responsible." The account having been opened, the bankers made advances to H. B. from time to time till Feb. 1827, when they ceased. A large balance was then due to them from H. B., who in October of that year paid a sum into the bank on account of it. In Feb. : 1828 the bankers took an acceptance from H. B. at three months for the balances of his account with interest, without the defendant's knowledge. In several previous instances the bankers had taken similar acceptances from customers who had overdrawn their accounts; but though the . defendant had been consulted by them as their attorney on the dishonour of several of them, it was not shown that he was aware of the practice of the bank in that particular:—Held, that the taking the acceptance from the principal debtor by the parties guaranteed, without the knowledge or assent of the surety, was a giving time to the principal, which altered the situation of the surety, and therefore discharged him from liability on the guarantie. Howell and another, Assignees of John Waters and David Jones, Bankrupts, surviving Partners of Robert Waters, deceased, v. William Jones, T. 1834.

HABEAS CORPUS.

It is no ground for bringing up a prisoner by habeas corpus, that the sheriff's warrant to the officer and gaoler, under which he was arrested and detained, did not state the court out of which the writ issued, it not being shown that a copy of the process was not delivered to him at the time of executing it, pursuant to 2 W. 4. c. 39. s. 4. Ashby v. Goodyer, E. 1834.

IF ANY.

Effect in pleading. Gould v. Lasbury. 863

INCLOSURE.
See Woods.

INFERIOR COURT.

See DEBT.

The court will remove a judgment from an inferior court, in order to issue execution thereon, pursuant to 19 G. 3. c. 70. s. 4.; though part of the debt has been levied by process from the inferior Court. Knowles v. Lynch, E. 1834. 477 Action of debt, on judgment of. Read v. Pope. 403

INQUIRY, WRIT OF.

No affidavit of merits is required where the execution of a writ of inquiry is set aside on the ground of irregularity in not giving notice Williams v. Wilof the inquiry. liams, H. 1834.

INSOLVENT DEBTORS' ACT.

A debtor brought up under the compulsory clauses, 16 and 17, of the lords' act, 32 G. 2. c. 28., had sixty days allowed to deliver his schedule; but having afterwards petitioned the insolvent court, under 7 G. 4. c. 57., this court enlarged the time for delivering his schedule to five days after he was to be brought up before the insolvent court. Perrolt v. Deanes, H. 1834.

A plea to an action of debt for goods sold and delivered, and on an account stated, that the defendant was discharged by order of the insolvent debtors' court, " of and from the said several debts and causes of action, if any," is bad on special demurrer, for hypothetically and not directly confessing the cause of action sought to be avoided. Gould v. Lasbury, T. 1834. 863

Semble, "supposed" only amounts to alleged." S. C.

T. being indebted to defendant in about 150l., a legacy of 100l. was left to his wife, whereupon T. and his wife signed and sent the following instrument to defendant:-" We hereby authorize the executors of the late Captain A. to pay to you any legacy or monies that he may have bequeathed to us or either of us in part payment of the various sums you have so kindly lent us, and your receipt shall be to them a sufficient discharge for the same. There appears to be about 150l. due to you." Defendant communicated to the executor his claim to the legacy before T. petitioned for his

discharge under the insolve ors' act, but the execut said he would pay the Before T. was discharged, ecutor paid her legacy wife, which she immediately to desendant:-Held, the was doubtful whether the rity would operate in equi assignment to the defend vesting T. and his wife of terest in the legacy, the in the legacy passed to the of T. under the insolve Best, Assignee of Thorom, Insolvent, v. Argles, H. 18 If a discharged insolvent giv to a creditor for the balance well on account of debts i before as since the dischi can only be relieved from tion on the bill by plead discharge under the insolv 7 (j. 4. c. 57. s. 61; ar give a warrant of attorney up judgment for the amou and costs, the court will n aside on motion. Philpot.

ku, T. 1834. The plaintiff and one Long about to dissolve part the plaintiff, in considers 2251. 4s. 6d., assigned th owing to the partnership t who, with J. A. and the def in consideration thereof, so and respectively covenant the plaintiff, that they or 1 one of them should and wo the 2251. 4s. 6d. by instal Held that this was not a co engagement by the defen pay if Long did not, but a lute covenant to pay at all and was determined as to ments becoming due subse to his discharge by the defe discharge under the insolv 7 G. 4. c. 57. Guy v. . M. 1833.

A person in insolvent circun

agreed with an attorney, who was one of his creditors, and held a cognovit for his debt, to procure and conduct his discharge under the insolvent debtors' act, and that the debt should be omitted from the schedule, and the operation of the cognovit suspended till after the discharge had taken place, when it was to be revived. the party's discharge, judgment was entered up and execution issued. The Court set them aside with costs. Tabram, Gent. one &c. v. Freeman, H. 1834. 180

INSPECTING AGREEMENT.

See Copy Agreement.

INSURANCE, (LIFE.)

Before effecting a policy of life insurance, a declaration and statement of health, freedom from disease, &c., was signed by the assured. By one clause, " if any untrue averment" was contained therein, or if the facts required to be set forth in the above proposal were not truly stated, the premiums were to be forfeited and the assurance to be void: Held, that as the health, &c. of the party whose life was insured was untruly stated, though not to the knowledge of the party making the declaration and statement, the premiums, &c. were forfeited, and could not be recovered back. Duckett v. Williams, H. 1834. 240

INTERPLEADER ACT.

See SHERIFF.

IRREGULARITY.

See Appidavit of Debt.—Practice, (Irregularity—Signing Judgment.)

JUDGE AT CHAMBERS.

Though a judge at chambers may

make order for staying proceedings on payment of debt and costs, he cannot order payment by instalments, nor give the defendant more time than he would have had by law. Kirby v. Ellier, H. 1834.

JUDGE'S ORDER,

For admitting handwriting, &c. to written instruments. v.'vi.

One rule is sufficient to make a judge's order for returning a writ in vacation a rule of Court, pursuant to Reg. Gen. M. 3'W. 4., No. 13, and also to call on a sheriff to show cause why an attachment should not issue against him for disobeying such order. Kensit v. Bulteel, M. 1833.

A judge's order granted in vacation

A judge's order granted in vacation must not be drawn up as of the preceding term. Rex v. Price and Wakelin, in Lawrence v. Morgan, M. 1833.

JUDGMENT.

See Practice, (Signing Judgment.)
Action on. See Debt.
On old warrant of attorney. Askinan v. Bowdler.
Time for signing on writ of trial.
884

JUDGMENT AS IN CASE OF NONSUIT.

Where a plaintiff, who had sued a defendant as acceptor of a bill, and got payment from another party, abandoned the action:—Held that the defendant, who disputed his liability as acceptor, was bound to take down the cause by proviso, and could not have judgment as an case of nonsue, or a peremptory undertaking to try. Monck v. Bonham, H. 1834.

When issue is joined in Trinity term, and notice of trial given for the

first sittings in Michaelmas term, which notice is afterwards countermanded, judgment as in case of a nonsuit cannot be moved for in Michaelmas term. Preedy v. Macfarlanc, M. 1833.

Marshall v. Foster, Id. note.

An affidavit, entitled, The defendant at suit of the plaintiff, and produced by the defendant, cannot be read. Richard v. Isaac, T. 1831.

Where issue was joined in a town cause, early in the vacation after Trinity term, and no notice of trial was given: Held, that the practice was not affected by the uniformity of process act, 2 W. 4. c. 39. and that it was premature to move for judgment as in case of a nonsuit in Hilary term, or before the third term. Wingroce v. Hodgson, H. 1834.

On motion for judgment as in case of a nonsuit, it appeared that the action had been brought and carried on to issue without the plaintiff's knowledge or authority, by an attorney who could not be found after diligent search. court ordered the rule to be served on the plaintiff himself:—Held, on showing cause, that the above circumstances did not exonerate the plaintiff from liability to pay the costs, he having a remedy but the against the attorney; court enlarged the rule in order to find the attorney, and granted a rule calling on him to pay the de-Mudry v. fendant his costs. Newman and another, T. 1834. 1023

LANDLORD AND TENANT.

See Disclaimer.—Use and Occupation.

A printed instrument, purporting to be a form of demise of a farm, had originally contained in the haben-

dum words creating a ten year to year. But on the instrument in evide were found to be struck and were proved to have struck through before of the instrument by t charged. The remaining demise were " for the te year fully to be com ended," and stood immedi ceding those which had be However, many st stipulations remained in t which seemed to be only a to a tenancy for longer th or determinable by notice Held, first, that the wor through might be looked certain the real intentic parties in so crasing tl consequently that the ter for one year only; and the stipulations inapple such a tenancy must be c as struck out, or as su unless the tenancy sho tinue for more than a yes

By the same instrume mise, after a covenant for of rent by the tenant, it w " that in case the tenar duly observe and perfori veral covenants and ag thereinbefore contained of and behalf," and should i quit the farm in pursuan tice to do so, he should be to a way-going crop to from lands in seeds or tu previous summer, such ci to be left for the landlo incoming tenant at a valu be made by arbitrators o pire:--Held, that this cl not give the tenant the possession of the land to clusion of the landlord. determination of the year's but at most only a right the land to improve the c

that the landlord might maintain trespass quare clausum fregit for taking possession of the crop, and hindering him from having the use and occupation of the land after the year expired. Strickland v. Maxwell, Esq., Sheriff of Yorkshire, and another, H. 1834. 346

Whether the payment of the rent was a condition precedent to the tenant's having the right to the way-going crop, quære. S. C. Shewing, in pleading, landlord's title expired.

776
Holding over.

LEAP-YEAR.

See Doe v. Harries, 185.

LEASES.

See Covenant .- Power.

LEGACY.

Where a testator in his will directs that one class of legacies "shall be paid prior to his debts and other legacies, and that all his legacies shall be paid within two years, free from legacy duty," the exemption from duty is not limited to such legacies only as are payable within two years, but the general words "all my legacies," will include a legacy given by a subsequent codicil, which is made payable at a different time. Byne and another v. Currey and others, E. 1834.

Passing property in. Best v. Argles. 256

LEGACY DUTY.

A will directed executors to lay out the residue of the personalty in the funds, and divide the interest "among poor pious persons, male or female, old or infirm, in 101. or 151., as they should see fit:" Held, first, that the executors could not be called on to pay legacy duty as beneficial legatees; and secondly, that "poor and pious persons" are not benefited by the bequest as a class, but that each individual selected by the executors was the person so benefited, and was consequently liable to pay the duty when the sum received should exceed 201, such duty to be their retained by the executor accordingly, after being calculated according to the party's propinquity in blood to the testator. In re Wilkinson, T. 1834.

LIBEL.

The declaration stated that defendant had been retained by the plaintiff to edit the plaintiff's newspaper for reward, and that he did not edit it in a proper manner, but without the knowledge, leave, authority, or consent of the plaintiff, falsely, maliciously, and negligently "inserted and published" therein a false and malicious libel &c. It then proceeded to state that an information was afterwards exhibited against plaintiff for "falsely and maliciously printing and publishing" the said libel; and that such proceedings were thereupon had that plaintiff was convicted of the offence and fined 1001. The plaintiff had a verdict for the fine and costs. However, judgment was arrested on the ground that upon the declaration the injury sought to be compensated did not appear necessarily consequent on the breach of duty charged against the de-fendant, for the act of printing and publishing by the plaintiff did not appear to be the same as that of inserting and publishing by the defendant. Colburn v. Patmore, T. 1834. **077**

Semble: The proprietor of a newspaper in which; without his

knowledge or consent, a libel is inserted by his editor, cannot recover against him the damages sustained by his own conviction

as proprietor. S. C.

A letter written by the defendant and containing a libel, was dated in Esser, and addressed to a person in Scotland. It was proved to have been in the Colchester post-office, and, after being marked there, to have been forwarded to London on its way to Scotland. It was produced at the trial, with proper post-marks, and with the seal broken, but not by the party to whom it was addressed. Held, sufficient prima facie evidence of publication in Essex, and that it had reached its address in Scotland. Warren v. Warren, T. 1834.

A letter to the manager of a property in Scotland in which plaintiff and defendant were jointly interested, relating principally to the property, and the plaintiff's conduct respecting it, but also contained a passage reflecting on his conduct to his mother and aunt:—Held that the latter part could not be privileged as a confidential communication. S. C.

LIEN.

Where a mortgage deed was delivered to a party as evidence of his title to apply for payment of principal and interest due thereon, no lien attaches on the deed in respect of his work and labour in so applying; for the value of the article deposited is not increased by any work done on or with respect to it. Saunders v. Bell, H. **1834.** 244

S. contracted with the defendants to execute an extensive building operation for them, in consideration of a certain sum, and of being allowed to use certain mate-

rials. The defendants' engi was empowered to reject any terials or work not in his opi conformable to the plans and cifications, and to provide o materials, and employ compe persons to perform the work, failed to do so, as well as to duct the amount from the payable to him under the contr The defendants were at lib to diminish or add to the wo paying S. at the contract pr accordingly, or deducting f them if necessary. S. placed the defendants' premises ste engines, rail-roads, materials, plements, and other articles of rious kinds, necessary to carry The defendants' the works. gineer visited the premises da and rejected such of the mater brought thither by S. as he thou unfit for use. During the I gress of the works advances w made by the defendants to S. his application; he agreeing t all the engines, materials, a brought or to be brought on defendants' premises for use constructing the works, should a security for such advan-Those advances always excee the value of the property so S. became ba the premises. rupt before the works were co pleted, upon which the defends erased his marks on the engit materials, implements, &c. then their premises. Crowfoot and oth assignees of Streather a bankri v. London Dock Company, E. 18

In trover brought by the ass nees of S. against the defenda to recover such engines, materia &c.: Held, first, that the arbit tor had no power to award t the defendants were entitled prove against the estate of S. the sum advanced to him by the

done and materials furnished by him, and of the engines, &c. agreed to stand as security. Secondly, That the plaintiffs were not entitled to recover for extra work done by the bankrupt. Thirdly, That as there had been such a possession of the engines, materials, &c. by the defendants as would support the lien, which it was the effect of the bankrupt's agreement to confer on them, the plaintiffs were only entitled to recover for such materials, &c. as were brought on the defendants' premises after the act of bankruptcy. Fourthly, That payments to the bankrupt by the defendants, after the latter portions of materials were brought on the premises, could not be considered as payment for those particular goods in the course of business, but as general advances only, so that they could not be retained by the defendants under 6 G. 4. c. 16. s. 82. S. C.

LIMITATIONS, STATUTE OF. See Writ.

Assumpsit for goods sold and deli-Plea: statute of limitations. A writ of summons tested within six years from the accruing of the cause of action was put in by plaintiff. It had been twice rescaled, and was not served until after the six years had expired. No evidence was given by the defendant when either resealing took place: Held, that the resealing gave effect to the original writ without amounting to a re-issuing of it, and without making it necessary for the plaintiff to prove the date of the resealing or more than the teste of the writ. Braithwaite, executor of Ullock, v. Lord Montford, H. 1834.

beyond the value of the work done and materials furnished by him, and of the engines, &c. agreed to stand as security. Secondly, That the plaintiffs were not entitled to recover for extra work done by the bankrupt. Thirdly, That as there had been such a possession of the engines, materials, &c. by the defendants as would support the lien, which it was the effect of the bankrupt's agreement to confer on them, the plaintiffs were only entitled to replaintiffs were only entitled to regularly entered up accordingly.

If continuances are regularly entered upon the roll, the court will not look at any thing in order to contradict the roll, e. g. a writ produced to show that a second writ, an alias, was tested on a day subsequent to the return day of the first. Dickenson v. Teague, E. 1834.

Effect of statute, as to suing for attorney's bill. See Harris v. Osbourn.

W. B., by will dated in 1812, bequeathed a legacy of 250l. to each of his daughters Ann and Jane, on their attaining twenty-one, and having appointed two persons executors of his will, and three others trustees, with all necessary powers to fulfil it, died soon after. In April 1823, the trustees became possessed of the sum of 500%. retained by them from the surviving executor, as money arising from the estate of W. B. to be set apart for the payment of the above legacies, being the only sum remaining in their hands to pay They then advanced the same. this sum to the executor, and the defendant (as his surety) on the security of a joint and several. promissory note signed by them, and payable with interest to "the trustees acting under the will of W. B. or their order, upon demand." The legacies not being

yet payable, it was next agreed; verbally, that while the legatees lived with the executor, no interest should be payable on the note. In August 1828, the executor paid | Ann, who had previously attained 21, her legacy of 250l. with interest for such time as she had ceased to live with him. The surviving trustee of IV. B. sued the defendant on the note in 1832. Held, that he was entitled to recover thereon for the legacy payable to Jane, who had come of age in the interim, the part payment by the executor to Ann having taken the case out of the statutes of limitations, 21 Jac. 1. c. 16., and 9 Geo. 4. c. 14. Megginson v. Harper, M. 1833.

In order to take a case out of the statute of limitations, a letter from defendant to plaintiff was put in, in which were the following words:

"I shall be most happy to pay you both interest and principal as soon as convenient," and in a subsequent part "I shall pay no more interest till we have a fair settling." Other letters of the defendant acknowledged a debt, but spoke of a settling between him and the plaintiff.

Held, that in order to enable the plaintiff to recover, some evidence must be given that a time had arrived when it was convenient to the defendant to pay, and semble also that the settlement alluded to had taken place between the parties. Edmunds v. Downes, H. 1834.

Whether the date of an acknowledgment of debt made in writing pursuant to 9 G. 4. c. 14. s. 1. can be proved by extrinsic oral evidence, quære. S. C.

Though a debt from defendant to plaintiff, larger in amount than a subsequent payment, is proved to have existed at a time p such payment, and no count appears to have c tween them; the mere f payment of a sum by de plaintiff is not enough case out of the statute tions without some evide tisfy a jury; first, that payment of a debt, and it was not the discharge lance due, but a payment to be applied to the part of the particular debt.

A desendant is not enrule to enter a nonsuit of taken at the trial and a approved by the court, if judge at his i prius gives it so to move; but can on rule for a new trial. Theane, T. 1834.

The statute of limitations in sit begins to run from when the cause of action Therefore where by a lo pike act the trustees we first the expenses of obta act, and next, the exp erecting toll-houses &c., who brought an action and labour in so doing, n six years after the work within six years of the ti the trustees had funds in having paid off the exp the act, it was held that he late, as the action was r able after the work done the execution would ha postponed. Emery, surrir ner of Rich deceased, v. 1834.

Where a local turnpike vided that all orders of tees should be entered i kept for that purpose, an them to pay a bill is no done so as to take a del the statute of limitations, G. 4. c. 14., unless it is so

in writing; the only act capable of taking the case out of the statute being the payment of principal or interest. S. C.

A clerk to turnpike trustees is not personally liable under a clause by which they may sue and he sued in his name. S. C.

In assumpsit for goods sold and delivered, the general issue and a plea of the statute of limitations were pleaded. The plaintiff's replication traversed the latter plea. His evidence consisted of such an admission by the defendant as would have been evidence to go to a jury on the general issue, that a debt was owing from him to the plaintiff; but he did not prove when the debt was contracted. No evidence was given for the defendant in support of his plea. Held, that it was incumbent on the plaintiff to support the affirmative terms of his replication, by showing that the debt was contracted within six years, or that the acknowledgment or promise was made in some writing signed by the defendant, so as to take the case out of the statute, pursuant to 9 G. 4. c. 14;—and a nonsuit was entered accordingly. Wilby v. Henman, E. 1834. 957

LIQUIDATED DAMAGES, 566 LONDON, CITY OF.

The charters of the city of London vest in that body, fines for misdemeanors committed within the city, though imposed or adjudged by the court of King's Bench, sitting in banc at Westminster, after a trial at the sittings at Guildhall. The King v. The Mayor and Inhabitants of the city of London, In the matter of the fine set on Mozely Woolf, T. 1834.

See Courts of Requests.

LORDS' ACT. See Insolvent Act.

MALICIOUS PROSECUTION.

In an action against a party for maliciously and without probable cause informing against the plaintiff for an offence, it is a sufficient answer to say that the plaintiff having been convicted of trespassing on land in pursuit of game, in the day-time, under 1 & 2 W. 4. c. 32., underwent the sentence of imprisonment according to that conviction, without appealing against it within the time and in the manner pointed out by section 44 of that act. Mellor v. Baddeley and another, E. 1834.

MEMORANDA, 380. 382

MESNE PROFITS.

A plaintiff recovered in ejectment on a demise laid on 5 June. In the action for mesne profits, the occupation being proved from that day, the defendant showed that a sum being due on 24 June for ground-rent, was paid by him:—Held, that he might deduct that sum from the damages recovered for the mesne profits, and that the plaintiff could only recover the costs taxed between party and party. Doe v. Hare, M. 1883. 29

MISNOMER. See Bail-Bond.

MONEY HAD AND RECEIVED.

In 1810 the defendant's wife died seised of certain freehold, with which was intermixed certain copyhold, to which she had been admitted in 1804. She left surviving her the defendant, and an only daughter, who was shortly after admitted to the copyhold and

The defendant married in 1815. remained in possession of the freehold ever since as tenant by the curtesy; and also of the copyhold ever since, letting them both from time to time together at an entire rent, and never recognizing any right in his daughter or her hus- ' band to either copyhold or rent. No title was proved except from the court rolls of the manor. was insisted that the defendant's possession must be taken to have continued for the protection of his daughter's right, and that he was therefore her agent for receipt of the rent of the copyhold, liable to an action by her husband to recover it, as money had and received to his use. Held, that the husband could not maintain that action against the defendant without proving such an agency, or some recognition by him of his daughter's right, so as to establish a privity between the plaintiff and defendant, and avoid the question of title, which would otherwise have arisen. Clarence v. Marshall, clerk, H. 1834. 148

Semble, the husband might sue alone. S. C.

The agent for the owner of a ship produced to the captain an account, which after debiting him with various sums received to the use of the owner, and crediting him for various payments on account of the ship, showed a balance against him. To that account the captain assented and The agent then prosigned it. duced another account of the captain's claim on the owner for wages, to which, as there stated, the captain refused assent. The first account was the only evidence of money had and received by him to the owner's use. In an action | Mere knowledge by a credito against him by the owner, both accounts were produced. Held.

that the admission by th ant on the first account received to the plaintiff's clusively proved the plain entitled to recover on the money had and received semble under the circums was not evidence on the stated. Lorymer v. Step 1834.

> NEWSPAPER. See LIBEL.

NEW TRIAL. See PENAL ACTION.

NONSUIT.

Leave necessary for moving

NOTICE, SHORT, OF 1 See TRIAL.

OCCUPATION.

See DEMISE. -- MESNE PRO An undertenant who is in po at the determination of the nal lease, and is permitted reversioner to hold over, tenant at sufferance; and t fact of occupation, coupl the payment of rent for su of occupation, does not r presumption of a demise for unless there is some evid show an agreement for a for a term. Simpkin v. Gent. one &c., T. 1834.

> PARTIES TO ACTIC See Suir.

PARTNERS.

See Insolvent,-Smil dissolution of partnership, release the old partners fro

liability to him, though he continue his account with the new firm, unless he appears expressly, or by some act, to have accepted the substituted credit of the new partnership instead of the retiring partners. C. M. and N., trading under the name of J. K. and Sons, partners. were indebted to A.: -C. retired from the partnership, and M. and N. undertook to liquidate the con-Afterwards N. went out of the business, and on his retirement a new partner was taken in. At that time a notice of the previous dissolution of partnership was advertised in the Gazette, but there was no proof that the plaintiff ever saw that advertisement. No notice was given of the introduction of the new partner; the business was carried on in the old estyle of J. K. and Sons, and the plaintiff continued his account with them under that name. eleven months after the dissolution, in a letter to one of the partners who had retired, plaintiff said he was aware that after the dissolution he had no claim against him, " but there was nothing to show that he accepted the substituted credit of the new partner in his stead:" Held, that the three original partners to whom the loan was made were not released from their liability. Jane Kirwan, Administratrix of Antony Kirwan, v. Clement Kirwan, Matthew Kirwan, and Nicholas Tuite Kirman, E.

A solvent partner may sue out a writ in the name of his copartner, or, if bankrupt, in the names of his assignees, as well as his own, in order to recover a debt due to the partnership. Whitehead suing with Dorning and others, assignees of Greenwood, a Bankrupt, v. Hughes and another, M. 1833. 92 The plaintiff and defendant had

VOL. IV.

worked a coal-pit in partnership till it was exhausted, when plaintiff said he would join in no more coal-pits, and defendant said he should work another whether plaintiff joined him or not. The materials and utensils belonging to the mine were valued, and each party was to take an article by turns, according to that valuation, till the whole was divided. The valuation was made, and it was subsequently agreed that the defendant should take the whole at the valuation, and he took possession of them. Jackson v. Stopherd, H.

The other partnership debts and credits remained unsettled: Held, that this was a transaction, so separate and distinct from the general accounts, that the plaintiff might sue for his moiety of the value of the materials and utensils before the final settlement of the partnership accounts. S. C.

A valuation made for the information of parties, and not binding on them, is not made liable to an appraisement stamp, by 55 G. 3. c. 184. Sched. Part. I. tit. Appraisement, though an agreement is afterwards founded on it. S. C. Ibid.

PAYMENT

To apprentice in his master's counting-house will bind the master if made in the usual course of mercantile business, and in discharge of a commercial debt; but such a payment of money, if made to him. on another account, as e. g. by a stakeholder of a sum to be deposited with him, will not. Saunderson v. Bell, H. 1834. 244 Plea of, see Account stated.

PAYMENT INTO COURT.

Payment of money into Court on a declaration in assumpsit containing

special and common counts founded on a variety of dealings between the parties, cannot be applied by the plaintiff to any particular count only, but the defendant may so apply it to the damage therein stated to have been incurred. Drake v. Levin, T. 1834. 730

Where payment into Court was made generally on a declaration containing one count charging the defendant for the produce of sales as factor on a del credere commission, and another charging him with having negligently sold plaintiff's flour to an insolvent person; the defendant, in order to show the transaction in question to be one which was not admitted by the payment into Court on the first count, gave letters in evidence to show that the plaintiff had admitted the sale in question to be his own affair, and not guarantied The jury found by the defendant. a verdict for the defendant, and the Court did not disturb it, on the ground that this evidence was improperly received. S. C.

An authority to proceed in an action to recover a debt due from a party, does not sanction opposing his discharge in the insolvent

debtors' court. S. C.

A master of a ship sued four defendants in indebitatus assumpsit, for wages and money paid. All four paid money into Court. At the trial the plaintiff proved an agreement written by W. one of the defendants, signed A. W. and Co., by which the plaintiff was engaged as master of a ship for a voyage | of three years certain, at yearly wages. He proved that he served accordingly, and then put in the rule to pay a sum into Court not amounting to one year's wages. The defendants having objected that the plaintiff must be nonsuited for want of proving all the defendants to be liable, showed that of of them was neither a member the firm of A. W. and Co., or a owner of the ship which the plain They then pro tiff commanded. duced the ship's accounts rendere to them by the plaintiff, in whice they sought to set off against h demand the items with which I had credited them, and to preven him from recovering against the as for money paid on account the ship, certain medical and other disbursements there charged i the ship. Held, that, under the circumstances, the whole deman of the plaintiff, though consisting of distinct items, was referable one contract, and that cons quently payment of money in court by the four defendan being referable to that contra only, admitted it to be made t the four defendants, so as to his der them from setting up as a de fence, that one of them was n party to it. Ravenscroft v. Wu and three others, T. 1834.

PENAL ACTION.

A new trial will be ordered after verdict for the defendant in a p nal action, if the jury find the verdict against all the evidence a cause on a misapprehension the law, whether arising from the own mistake or the misdirectic of a judge. Gregory v. Tuffs, 1834.

PLEADING.

See Practice (Signing Judgment.)
LIBEL.—SEANDER.—WAY.

Where an administrator, being und terms to plead issuably, pleads is consistent pleas, c. g. plene administravit and his bankruptey, tl plaintiff may sign judgment as f want of a plea. Serle, Execute v. Bradshaw, Administrator, 1833.

Where the first count of a declaration was against the defendant as acceptor of a bill of exchange, stating a promise to pay the bill without any breach, and was followed by a count for money lent, money paid, &c. with a promise to pay limited to the latter sums, the breach is good if it goes on to state that he has disregarded his promise, and hath not paid the said monies to the plaintiff. Turar v. Denman, H. 1834.

Where by any statute made before 3 & 4 Will. 4. c. 42. a defendant had a right to give special matter in evidence under the general issue, that right is reserved to him by section 1. of the last-mentioned act; but since Reg. Gen. Hil. 4 Will. 4., he cannot plead the general issue, and also a special plea of justification. Neale v. Mackenzie, T. 1834.

Where a declaration alleged the defendant to be indebted to the plaintiff in a certain sum for work and labour, without laying any promise to pay it, and then under a 'whereas also,' proceeded to state him to be indebted to plaintiff in several other sums for goods sold and delivered, &c. concluding that the defendant had promised to pay the said last-mentioned several monies respectively to the plaintiff on request :- Held bad on demurrer for want of promise in the first count, which was not referred to by the word " lastmentioned" in the second count. Harding v. Hibel, H. 1834.

In debt on a bail-bond, it is not a sufficient defence to plead that no affidavit of debt was filed in the action against the principal, pursuant to 12 Geo. 1. c. 29. s. 2. Knowles, Assignee of Wilson and Harmer, Sheriffs of London, v. Stevens, E. 1834.

Semble, that to raise the ques-

tion on that act, whether the entire absence of such an affidavit is a defence to an action on a bail-bond, it should be pleaded that no such affidavit was made. The plea must conclude with a verification or to the country. S. C.

Regulæ Generales.

As to pleading, Hil. T. 4 W. 4. vii.—xvi.

In scire facias on a recognizance of bail, the plaintiff stated by way of memorandum, at the head of the matter intended to be a declaration, that he brought in his bill in a plea of debt on a recognizance, the tenor of which bill follows in these words, to wit: ' Middlesex, to wit. Be it remembered &c. stating the two writs of sci. fa., the first of which recited the judgment against the party bailed. no ca. sa. against the principal. Replication set forth ca. sa., and stated to be directed to and returned by the sheriffs of London. Rejoinder, that the original action was brought and the venue laid in Middlesex, and not in London. Surrejoinder raised an issue that the original action was brought, and the venue therein laid in London, concluding with a verification. Special demurrer thereto, assigning for cause that it should have concluded to the country: Held, that the surrejoinder was good, as it did not necessarily follow that the action must be said to be brought in the county where the venue was originally laid, for by change of venue the proceedings in the action may have been elsewhere; and 2dly, that the commencement of the declaration improperly stated that a bill was brought in &c. might be rejected as surplusage, after pleading over to it, as the objection had not been taken on special demurrer to the

declaration. Darling v. Gurney M. 1834.

A party who demurs specially to subsequent pleading, c. g. a sur rejoinder, may, on the general words of the demurrer, object to previous pleading, c. g. the declaration, though he has pleaded ove to it, if the objection is duly state on the margin of the demurre book. See Reg. Gen. Hil. 1831 No. 2. p. i. S. C.

Where work was not duly performe according to a special contract and there is a common count for work, labour, and materials, a well as a special count, the defendant may prove the inferiority of the work and materials, and the plaintiff will only be entitled to recover on the common count for so much as the work, labour, an materials are worth. Chappel of Hicks, M. 1833.

Assumpsit. The first count state that plaintiff had lawfully distraine for 350/. due for rent on the el fects of one L_{ij} , against whom fiat had issued, and of whose es tate defendant claimed to be as signee, and had put a person i possession thereof; and that i consideration that plaintiff, at request of defendant, would with draw the said person so put int possession, defendant claiming t be assignee as aforesaid, undertoo that the said sum should be pai to the plaintiff out of the produc of the sale of the same effect. Averments, that plaintiff did with draw the person from possession and that defendant took posses sion; but though a reasonable tim for sale of the effects and for suc payments had elapsed, did not pa

the said sum to the plaintiff:
Plea, that before defendant promise was made, a fint in bank tuptcy was issued against L., under which L. was found a bank

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terestin land; viz; for rent intarrear, is bad on general demurrer. on obforcoles allege that the plaintiff held as tenant to the defendant under a demise, and the plaintiff replies generally, the law presumes that the reversion is in the landlord, and that therefore he has a right to distrain. Any question as to the landlord's reversion should be raised on a special reiphication. Hpoker v. Nye and manother, Tul 834. By executors: Jones v. Roberts. 48 In slander. See Stander. On bills, &c. : See Bonts and Norts. Constituction of the terms wsupposed," ... alleged," and "if any. Mould v. Lasbury, T. 1834. 863 adent ad het oner

PLENE ADMINISTRAVIT.

See Executors.

PLURIES.

trading to the See Writt.

POLICY OF INSURANCE.

A ship's policy of assurance contained a memorandum in the margin, that the said ship was "warranted not to sail for British North America after 15th August, 1831." On that day she was in dock at Dublin ready for sea, and having cleared for Quebec, was hauled out of dock into the Liffey as early in the afternoon as the tide permitted. The wind blowing strong and directly up the river, she could not set a sail, but was warped down about half a mile, when the tide falling she took the ground. The master knew at the time of leaving the dock that the ship could not get to sea that day. She was warped a little further next day, took the ground again, when the tide fell, being still ten miles from the harbour's mouth. On the 17th, the wind having changed, she set her sails

tratrix, v. Fisher, E. 1834. 424
Held, that if at the time of breaking ground in the harbour, and going down the river on the 15th, the captain acted bona fide with intent to put himself in a more favourable position to proceed on his voyage, the warranty was satisfied, even though he had also intended to comply with its terms; but that if he so moved the ship not in order to get a better position, but with the sole object of keeping within the letter

and got to sea. Cochran, Adminis-

a new trial was ordered. S. C. POOR-RATE.

of the warranty, it had not been

complied with. This alternative

not having been put to the jury,

An increased poor-rate having been assessed on certain premises, an appeal against it was entered at the next sessions and there respited, but no notice in writing of that appeal was given to the overseers under 41 G. 3. (U. K.) c. 23. s. 2. Before the hearing of the appeal the overseers distrained for the increased rate; the amount was paid under protest, and possession of the distress was thereupon relinquished. The rate was afterwards reduced by order of sessions, in consequence of a decision of the King's Bench. An action having been brought by the ratepayers against a person who was overseer at the time of the distress, to recover the surplus as for so much money had and received by him to their use: Held, that no notice of appeal having been given to the overseers, pursuant to the statute, the action would not lie. Priestley v. Watson, E. 1834. 916

POSSESSION.

Keeping, for daughter. See Clarance v. Marshall. 147

POST OFFICE. See Libel.

POWER.

By a leasing power in a marriage settlement, dated 5th August, 1777, power was reserved to the persons in actual possession, by virtue of its limitations, to lease any part of the lands thereby settled in strict settlement "for one, two, or three life or lives, or any term or number of years not exceeding twenty-one, so as upon all and every such lease or leases there should be reserved and continued payable, during the respective continuance of such lease and leases, by halfyearly payments, the best and most improved yearly rents that could be reasonably had or obtained, without taking any sum or sums of money or other thing by way of fine or income for the same." By lease of 11th January, 1783, the tenant for life of the settled property (one of the creators of the power) demised a part of it to hold from the 4th January preceding for three lives, reddendum the yearly rent or sum of 31l. 10s., at or upon the two most usual feasts or days of payment in the year, viz. the feast of St. Philip and St. James the Apostles (1st May), and St. Michael the Archangel (29th September), by even and equal portions; the first payment to be made on the feast of St. Philip and St. James the Apostles, next ensuing the date of the lease: Held, first, that the lease was void, the power not having been duly executed by reserving the rent at half-yearly periods; - secondly, that old leases of other lands in the neighbourhood were not admissible to show the above feast days to be the usual half-yearly days of payment in that country.

Doe on demises of Harries & others v. Morse, H. 1834.

PRACTICE

Of court distinguished from course directed by statute 2 W. 4. c. 39

(Attorney.)

The construction of Reg. Gen. M. 1 W. 4. No. 8. (ante, Vol. I. p. 160,) is, that an attorney residing out of London, Westminster, of Southwark, but within ten miles must enter in the book at the of fice of the clerk of the pleas, some proper place, within one mile of that office, where notices &c. may be served. Blackburn v. Peat, M. 1833.

Pleadings are within that rule. S. C.

(Capias.)

If a capias does not state the residence of the defendant, pursuant to 2 Will. 4. c. 39. Sched. No. 4. it will be set aside for irregularity, with all subsequent proceedings, notwithstanding Reg. Gen. Mich. 3 Will. 4. No. 10. Price v. Huxley, M. 1833. 68

(Cognorit.)

The directions of Reg. Gen. Hil. 2 W. 4. No. 72. should be strictly complied with. Therefore when a cognovit or warrant of attorney is executed by a defendant who is in custody on mesne process, the attendance of an attorney who has been requested to attest the execution by the clerk to the defendant's attorney, will not suffice, though the defendant make no objection at the time; for he is not named by nor does he attend at the defendant's request. Fisher v. Papanicolas, M. 1833.

Semble, that the attorney for the defendant who subscribes his name

as a witness to the execution of the cognovit, should in writing thereon declare himself to be attorney for the defendant, and that he subscribes as such pursuant to the rule. S. C.

(Direction of Writ of Summons.)
Directed to the sheriffs of Middlescx is bad, and will be set aside with costs. Barker v. Weedon, T. 1834.

See VARIANCE.

(Indorsement on Writ of Summons.)

A stack of hay standing on the defendant's premises was sold by him to the plaintiff, who was to take it away by a fixed day. Before the time arrived, the defendant's landlord distrained it for rent: Held, that the amount of debt and costs need not be indorsed on the writ of summons, as the cause of action was partly for the loss of the right to keep the hay on the ground. Perry v. Patchett, T. 1834.

(Amending Writ of Summons.)

No amendment of a writ of summons will be permitted except in a case where the plaintiff's demand would otherwise be barred by the statute of limitations. Lakin and two others, Executors of Watson, v. Massie, T. 1834.

(Making up Issue.)

The declaration was delivered in Michaelmas vacation, as of Michaelmas term; and the plea, entitled on 11th January, was delivered as of that day (being the first day of Hilary term). The issue was made up and delivered as of Michaelmas term. The Court refused a motion to set it aside, for not being made up of Hilary term; as the plea might have been delivered before the sitting of the Court on 11th January, and no damages appeared

from the issue being entered of Michaelmas. Dickenson v. Reynolds, H. 1834.

(Notice of Inquiry.)

Notice of inquiry may be stuck up in the office of pleas, and a copy left at defendant's last place of residence, by leave of the Court, where the defendant had never been found to be served with the previous proceedings, and the persons resident at her last place of residence refused to say where she now resides. Watson v. Delcroix, Executrix, H. 1834.

(Personal Service.) See WRIT.

(Plaintiff suing in Person.)

If a plaintiff living in a place not "within any city, town, parish, or hamlet," (c. g. Gray's Inn.) and suing in person, describe himself as of the extra-parochial place, it is sufficient under the uniformity of process act, 2 Will. 4. c. 39. s. 12. King v. Monkhouse, H. 1834.

(Rejoining gratis and Joinder in Demurrer.)

A defendant being under terms to "rejoin gratis," need not join in demurrer within twenty-four hours after demand of joinder in demurrer. Jones v. Key, H. 1834.

(Rule to compute.)

If several defendants, sued on their joint promissory note, suffer judgment by default, it is sufficient to serve one with the rule to compute. Figgins v. Ward and two others, H. 1834.

(Security for Costs.)

Security for costs will not be required where the plaintiff, being in indigent circumstances, sues qui

1066

tam in several actions, his broth in-law being attorney in th Gregory, qui tum, v. Elridge, 1831.

18

Where in an action by a foreign security has been given for coin an amount afterwards much ceeded by the defendant's cactually incurred on the trial, too late for him to move for ther security for costs after a rauit and pending a rule for a trial. Alizon v. Furnical, H. 14

Where a plaintiff becomes banki before the trial of a cause, the fendant cannot apply for secu for costs till he has ascertai that the assignces have resolve proceed with the action. Wal shaw v. Marshall and another 1834.

A plaintiff declared in time go to trial at the sittings in chaelmas term, had not two ore for time to plead been obtain As the "usual terms" were posed, viz. inter alia, the accept short notice of trial, the plain might still have gone to trial the sittings after that term, did not. On the 10th January appeared in the Gazette at bankrupt, and on the 29th issue was delivered: Held, tan application for security for confrom the assignees, made on 31st Jan. was in time. S. C.

(Irregularity—Signing Judgmen

A defendant who had obtained to plead, and afterwards an or for particulars of plaintiff's mand, delivered a plea not sign by counsel, though concluding was verification three days before time for pleading expired. I plaintiff treated the plea as a rality, and signed judgment before that on which the time for pleading that on which the time for pleading to plead the plead that on which the time for pleading that on which the time for pleading the plead that on which the time for pleading that the plead that the

Gen. Hil. 4 W. 4. No. 2. Cresswell v. Crisp, E. 1834. 991

PRIVILEGE.

See AMBASSADOR.

In an action on the case against a party for causing the arrest of a person privileged from arrest (e. g. a witness attending on his subpoena, or a practising attorney,) thereby putting him to the expense of finding bail and procuring his discharge by order of a judge, the plaintiff must show that his imprisonment at the particular time in question took place by some act of the defendant, and that he knew or recognized the circumstances accompanying it, and also knew that the party arrested was privileged at that time. Stokes v. White, gent., Side Clerk, &c. Т. 785 1834.

Whether such an action is main-

tainable, quære. S. C.

The offices of the sworn and side clerks of the Exchequer are not abolished by stats. 1 Will. 4. c. 70. or 2 & 3 Will. 4. c. 110; but as the sworn clerks are thereby disqualified from acting as practitioners, the side clerks can no longer sue in their names, though they may still practise there as attornies without being admitted as such. S. C.

PROBATE DUTY.

M. S. by will bequeathed certain stock in the funds to trustees to stand pessessed thereof on such trusts and for such purposes, and subject to such powers and declarations, as J. S. by deed, with or without power of revocation and new appointment or by will should appoint; and in default of appointment, in trust to pay J. S. the dividends for life, and after her decease to divide the principal

among her children then living. After the testator's death, J. S. duly executed a deed according to the form prescribed by the will, by which deed, after reciting her desire to execute the power vested in her by the will of M. S., she directed the trustees to transfer the fund to herself and a new trustee, upon such trusts, for such purposes, and subject to such powers &c., as she should by any deed, with or without power of revocation and new appointment, or by her last will, direct and appoint; with certain limitations over in default of appointment, similar to those contained in the will. Under this deed the stock was transferred into her own name and that of her co-trustee. Afterwards J. S., by will made by virtue and in execution of the last-mentioned power reserved to her by that deed, and of all other powers, appointed the stock to be transferred to certain persons, in trust that it might be consolidated with and become part of her residuary personal estate, and follow the dispositions thereof thereinafter contained: Held, that the deed executed by J. S. being an exercise of the power given her by the original will, the property became her personal estate in which she had a beneficial interest, and was as such liable to her debts, and therefore that it was liable to the payment of probate duty under 55 Geo. 3. c. 184. s. 38. Attorney-General v. Staff and another, M. 1833. 14 Probate duty is not payable under 55 Geo. 8. c. 184, in respect of personal assets of an English testator domiciled and dying in England, which being locally situate in a foreign country at the time of his death were not brought hither till after that event by his executors, though they had obtained

1068

an English probate in respect his personalty situate in Engla and proceeded by virtue of a probate to collect and adminiin this country the whole of assets. Sir William Horne, I his Majesty's Attorney-Gene Appellant; and Wm. Hope, Ja Wood, and James Brierly, spondents, Dom. Proc. T. 183-

PROCESS.

Service of copy of, varying finding original. See VARIANCE.—WI

QUANTUM MERUIT.

See PLEADING.

REGULE GENERALES. Reg. Gen. Hil. 11 & 15 Car. 2 r. 4 - Easter, 4 G. 2 – Hil. 26 & 27 *G*. 2 10 – K. B. Hil. 8 *G*. 3 - Hil. 39 G. 3 - Easter, 5 *G*. 1. - Mich. 1 W. 4. No. 8 - Hil. 1 W. 4. No. 6 ---- Mich. 2 W. 1. No. ii. — Hil. 2 W. 1. No. viii. — 2 W. 1. No. 17 __ 2 W. 4. No. 33 ____ 2 W. 4. No. 19 - 2 W. 4. No. 67 – 2 W. 4. No. 72 - 2 W. 4. No. 74 - 2 W. 4. No. 93 - 2 W. 1. No. 107 - Trin. 1831 – Hil. 3 *W*. 4. No. ii. - 3 W. 4. - Mich, 3 11, 4 No. v. - 3 W. 4. No. 6 - 3 W. 4. No. 10 - 3 W. 4. No. 10 3 W. 4. No. 13 3 W. 4. No. 15 Hil. 4 W. 4. No. 5

serve on board the ship Royalist, "bound from the port of London to the South Seus to procure a cargo of sperm oil, and to return therewith to the port of London, where the voyage was to end." Instead of wages he was to receive a certain share of the net proceeds of the cargo; and it was stipulated that no one of the crew should "demand or be entitled to his share of the net proceeds of the said cargo until the arrival of the said ship or vessel at London, and her cargo should be there sold and delivered, and the money for the same actually received by the Jesse, Administrator of Jesse, deceased, v. Roy and another, Executors of Smith, T. 1834. 626

A cargo was procured, the ship was afterwards condemned in a foreign port, and the mariner accompanied part of the cargo on its homeward voyage (it having been shipped into another vessel, the Alexander,) but died at sea. Held, that "until" in the above articles is a word of limitation of the mariner's right to wages, and not of postponement of payment of them merely; and consequently that as the ship did not return to London, the administrator of the mariner was not entitled to recover his 95th share of the net proceeds of the Royalist's cargo, but only to recover a quantum meruit for his services on board the Alexander. S. C.

SECURITY FOR COSTS.

See Practice, (Security for Costs.)

SERJEANT-AT-MACE. 700 See Escape.

SERVANT.

SERVICE.

Of copy of process under practice of court. 994

SET-OFF.

Where any plea is pleaded besides the general issue, a notice of setoff will not enable the defendant to give in evidence the matters of his set-off under 2 Geo. 2. c. 22. s. 13. without pleading it. Duncan v. Grant, T. 1834. 816
But see now R. G. H. 4 W. 4, PLEADINGS, &c., No. I. Reg. 3. this Vol. p. xv.
Plea of. See Account Stated.

SHERIFF.

See Escape.—Writ of Trial.

Sending notes of trial. See Trial,
Writ of.

Discharging defendant in execution.
907. 910

The Court will not interfere under the interpleader act 1 & 2 W. 4. c. 56. s. 6. in favour of a sheriff who has seized goods ander a fi. fa., unless an actual claim of the property in question appears to have been made before moving for the rule. Bentley v. Hook, H. 1834.

Scmble, in an issue directed under the act, the claimant should be the plaintiff and the execution creditor the defendant. S. C.

Where on a rule obtained by a sheriff under the adverse claim act 1 & 2 Will. 4. c. 58. the claimant did not appear, the Court discharged the rule as regarded the plaintiff in the cause, and barred the claim of the claimant, and called on him and the defendant to show cause why they or one of them should not pay the plaintiff and the sheriff their respective costs occasioned by the rule. Lewis v. Eicke, H. 1854.

The declarations of a sheriff's officer

respecting goods seized by under a fi. fa. in his posses at the time, are evidence agithe sheriff, though made aftereurn day, and before any rant issued by him to execute venditioni exponas. Jacob Humphrey and another, H. 18

A sheriff must sell goods so under a fi. fa. within a reason time, and before the return venditioni exponas, or will be lito an action. S. C.

If a sheriff hands over any of goods seized under a fi. fa. claimant, a stranger to the cution, he is not entitled to tection under 1 & 2 Will. 4. c s. 6. Brainc, Assignce, v. 1 and another, H. 1834.

If notice of a claim by a sparty, and of the sheriff's in tion to move under that act, is given by the sheriff to the cution creditor before instruction by the latter to move for attachment for not returning writ, the attachment will be gred. S. C.

A party served with a subp duces tecum is bound to prothe required document in Co and need not be sworn. The an action against a sheriff t 32 Geo. 2. c. 28. for a penalty curred by the act of his office taking a party arrested u mesne process to a tavern, wit his free and voluntary consen was held, that the officer, being served with a subpoena d tecum on the part of the plain must produce his warrant in C Without its being necessary tos him as a witness. Summer Moveley, Esq., Sheriff of Shrops H. 1834.

Semble, if a party is so arreand when called on by the of to name, a safe &c. dwelling-h

damages, and on the other nine for 100/. Entire costs were taxed to him on the whole. 'A court of error afterwards held the sixth count bad, and that a venire de novo should be awarded as to the The plaintiff, hownine counts. ever, baving consented to remit his damages on the nine counts! instead of a venire de novo, that court directed the verdict to stand on the seventh count on those terms:-Held, that the master ought to disallow the plaintiff the costs taxed to him on the other nine counts. Dadd v. Crease, M. 1833.

A declaration for slander stated by way of inducement, that plaintiff was a pork-butcher, and then charged the defendant with publishing to plaintiff, in presence of other persons, these words of and concerning the plaintiff:- "You are a bloody thief—who stole F.'s pigs? You did, you bloody thief, and I can prove it. You poisoned them with mustard and brimstone;" inuendo, that plaintiff was guilty of pig-stealing. The jury found that the words were not intended to impute felony, but were spoken of plaintiff in relation to his trade:-Held, that the plaintiff was not entitled to recover, as the words used did not show that they were necessarily spoken of him in re-lation to his trade, and no colloquium concerning his trade was laid in the declaration. Sibley v. Tomlins, M. 1833.

The agent of a landlord employed the plaintiff to do work at the house of the defendant, who was a tenant on the estate. The plaintiff did it improperly, and got drunk during the time he was engaged in it. Several circumstances took place which induced the defendant to believe the plaintiff had breasen open his cellar-door and

got access to his cyder. Two days after, the defendant saw the plaintiff in company of T, a fellow-workman, and charged him with having broken his cellardoor, got drunk, and spoiled the work. The defendant afterwards repeated the charge to T. in the plaintiff's absence; and on the same day complained to the agent that the plaintiff had spoiled his work and had got drunk, that his cellar-door had been broken open, as he believed, by the plaintiff:—Held, first, that the complaint to the agent, if bona fide made, and without malicious intention to injure the plaintiff, was a privileged communication.

Secondly, that the uttering the words to the plaintiff, though in the presence of T, was similarly privileged, if done honestly; for that the circumstance of its being made in the presence of T, did not of itself make it unwarranted and officious, though that circumstance with others, e, g, the style and character of the language used, might be left to the jury to determine whether the defendant acted bona fide in making the charge, or was influenced by malicious motives in seeking an opportunity to make it before a third person.

Thirdly, that the statement to T. in the plaintiff's absence was unauthorized and officious, and therefore not protected, though made in the belief of its truth, if it turned out to be in point of fact false; and that it should be left to the jury whether defendant acted maliciously or not on that occasion. Toogood v. Spyring, T. 1834.

SPECIAL CASE.

STAMPS.	12 G. 1. c. 29. s. 1 & 2. 817.
See Annuity.—Legacy Duty.—	с. 29.
PROBATE DUTY.	2 G. 2. c. 3.
A note for 2001. with lawful interest	c. 22. s. 18.
reserved from a day prior to the	c. 23. 448. id. s. 23.279.
date, requires a stamp applicable	с. 36.
to a note for 2001. only. Wills,	c. 22. s. 13.
Executrix of Wills, v. Noott and	c. 23. s. 23.
another, T. 1834. 726	5 G. 2. c. 80. s. 7.
On valuation. See Jackson v.	c. 30—132. s. 41.
Stopherd. 330	11 G. 2. c. 19. s. 21.
Stophila:	14 G. 2. c. 17.
	25 G. 2. c. 36. s. 2.
STATUTES.	28 G. 2. c. 19.
o n	28 G. 2. c. 36. s. 1.
See Evidence.	32 G. 2. c. 28. s. 1 & 2.
D C Classic Walnut -	s. 16 & 17.
Proof of local act. Woodward v.	17 G. 9. c. 38. s. 7.
Cotton. 689	19 G. S. c. 70. s. 4.
9 H. 3. M. C. c. 11. 722	20 G. 3. c. 28.
34 Edw. 3. c. 7. 472 l.	22 G. 3. c. 83. s. 7 & 8.
13 Ric. 2. st. 1. c. 15. 642	25 G. 3. c. 58.
11 <i>H.</i> 4. c. 69. 563	29 G. 3. c. 51.
23 H. 6. c. 9.	36 G. S. c. 52. s. 5. 6. and 36.
32 <i>H.</i> 6. c. 9. 170	524—s. 7. 520—s. 11. 529—
1 Edm. 4. c. 1. s. 3, 13. 713	8. 27. 29.
22 Edw. 4, c. 7. 943 20 H. 7. 713	87 G. 3. c. 73.
	38 G. 3. c. 52. s. 1.
	39 G. 3. c. 73. 516. 3
32 H. 8. c. 30. 472 c. 35 H. 8. c. 16. 943	41 G. 3. c. 23. s. 2 & 8. 916. (
5 Eliz. c. 9. s. 12.	
14 Eliz. c. 25. s. 3. 18. 943	42 G. 3. c. 99. s. 2. 43 G. 3. c. 46. s. 3. 216. 222.1
27 Eliz. c. 5. 778	52 G. 3. c. 165.
29 Eliz. 720 n.	53 G. 3. c. 6.
1 Jac. 1. c. 15. 980	c. 14. s. 2.
21 Jac. 1. c. 16. 98. 960	c. 102. s. 32.
10 Car. 1. sess. 2. c. 6. 961	c. 141.
29 C. 2. c. 3. s. 3. 815. 622	c. 165.
	54 G. 3. c. 180.
5 W. & M. c. 21. s. 3. 892	55 G. 3. c. 184.—194. 325, 330.
9 & 10 W. 3, c. 15, s. 1. 462	468. 514—s. 37. 18. 14.4
c. 25. s. 59. 334	878. 1
	55 G. 3. c. 194.
3 & 4 Ann. c. 9, s. 1. 453	60 G. 3. and 1 G. 4. c. 4. s. 2.
4 Ann. c. 16. 671. 778—s. 20. 373	1 G. 4. c, 119. s, 28.
	5 G. 4. c. 25. s. 97.
4 & 5 Ann. c. 16, s. 20, 372	c. 98.
7 Ann. c. 12. s. 5. 36	6 G. 4. c. 16. 41, 477.
7 G. 1. c. 31.	s. 58
12 G. 1. s. 2.	B. 72 53.
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6 G. 41 c. 16, s. 81. 82. 86. 112 475	3
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7 G. 4. c. 57. Guy v. Newson. 31	Ì
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s. 61 729	
7 & 8 G. 4. c. 17. s. 1. 1017	
9 G. 4. c. 14. 94. 173.	
695, 931, 958	
s. 1. 98, 176 	
11 G. 4. & 1 W. 4. c. 68. 134 	
s. 12, 61	
s. 12, 61	
1 W. 4. c. 7. 	
1 & 2 W. 4. c. 32. s. 30. 44. 964	
2 W. 4. c. 39. 4. 68. 170. 266.	
277. 454. 649, 72 5.	
s. 4. 85 s. 10 308 s. 11. 60. 63 s. 12 234. 328	
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s. 11. 60. 63	
s. 12 254. 328	w
Schedule No. 4. 08	**
2 & 3 W. 4. c. 39. s. 3. 374	
c. 71. s. 2 & 5 502.	
c. 110. 794 785	
8 W. 4. c. 39. s. 3. 374	
3&4 W. 4. c. 42. s. 1. 670	
s. 11. 267	
8. 17. 41. 64. 270.	
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s. 17 & 18 836	
s. 23. 271	

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STAYING PROCEEDINGS.

See Judge at Chambers.

f a defendant is misled by the plaintiff's indorsing on the writ a larger sum than is due, and appears in consequence, instead of paying the sum really owing, with the costs of the writ in eight days, as he would otherwise have done, the court or a judge will stay the proceedings on a like payment, if he applies promptly after service of a declaration accompanied with particulars claiming the sum really due. Ellison v. Roberts, H. 1834. 214

SUBPŒNA DUCES TECUM.

See Summers v. Mosely, 159.— WITNESS.

SUBPŒNA SOLVAS.

See Costs.

SUPERSEDEAS.

See Error.

SURGEON.

Where a surgeon attended patients in cases requiring surgical aid, and also dispensed medicines to them, not being certificated as an apothecary under 55 G. 3. c. 194:—Held, that he might recover for his surgical advice. Semble, that a surgeon may dispense medicines to his patient in a case which he attends requiring surgical aid. Simpson v. Ralfe, H. 1884. 325

SURRENDER.

A. let premises, consisting of a stable and cottages, to B. for seven

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years. B., before the expiration of the term, assigned the premises to C. and paid his rent up to that day, which was in the middle of a half-year. C. occupied part of the premises, and on leaving them, not at the end of a half year, paid rent for the time to A.'s agent. A. was not at that time aware either of the assignment or the occupation by C. Afterwards. but still before the expiration of the term, A.'s agent advertised the premises to be sold, and no sale taking place, let two of the cottages to fresh tenants, in order, as he said, to relieve some tenants who had run away. The agent afterwards received portions of the entire rent from the tenants, and the rest from C. the assignee of B.: -Held, that these facts, taken collectively, amount to a surrender of the term by operation of law.

Semble, when a number of facts, which singly may be ambiguous, amount collectively to an unequivocal proof of a fact, c. g. the surrender of a term, a judge is not bound to submit them formally to a jury, unless the counsel expressly desires it. Recre v. Bird, T. 1834.

TENDER.
See Bills and Notes.

TENANT AT SUFFERANCE,
780

TIME, See 838.

TITHES.

Unless a tithe owner has a right of way to carry tithe off titheable lands within his parish, by grant of the owner of the fee or by prescription, he has prima facie only a right to use such road for that

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purpose as is used a the occupier to carry nine tenths; and i further right to use a from the particular cused by the occupiagricultural purposes convenient use of the not for the purpose of the crop, that right c while such way contibeing stopped up by James, clerk, v. Dod

TRESPAS!

On land in day-time, 1 W. 4. c. 32. See Medeley and another, E.

TRIAL, LOSII
See Bail.

TRIAL.

(Notice of.)

A defendant who is bot short notice of trial, is to take short notice of writ of inquiry. Whe ant is entitled to fou notice of inquiry, and eight days' notice only return it immediately, prevent expense; and did not do so, and let s of the eight elapse bef notice of motion to se proceedings for irregu rally, without pointing was, the inquiry was se without costs. Stepke H. 1834.

TRIAL, WRIT
Time for signing judgment
A bond in the penal su
was declared on as it

was declared on as if had been 2601.:—He mistake might be ame

1001

S. & 4. W. 4. c. 42. s. 23., and semble, by the sheriff trying an issue under a writ of trial. Hill v. Salt, H. 1834. 271

A motion for a new trial of an issue tried by a sheriff or other inferior judge, under 3 & 4 W. 4. c. 42. s. 17., should be made on producing a copy of the sheriff's notes, verified by affidavit, or if the rule is granted, it will be discharged. Johnson v. Wells, H. 18344

A sheriff or other judge presiding at the trial of an issue under a writ of trial, pursuant to 3 & 4 W. 4. c. 42. s. 17., has the same power to nonsuit that a judge at nisi prius has.

An action for unliquidated damages, e. g. in running down the defendant's boat, cannot be tried before the sheriff under a writ of trial. Watson v. Abbott, M. 1833.

Semble, that if on a writ of trial issued pursuant to 3 & 4 W. 4. c. 42. s. 17., a verdict was given for 204, and for a sum of 10s. for interest, a judgment entered up for both sums would be irregular. Burleigh v. Kingdom, H. 1834.

On 23d May the plaintiff had a verdict in a cause tried before a sheriff on a writ of trial issued under 3 & 4 W. 4. c. 42. a. 17. He did not sign judgment till the 27th, after taxing costs on that day:—Held, that the judgment was signed regularly and in time within the term "forthwith" in s. 18. Nicholls and another v. Chambers, T. 1834.

If a sheriff before whom a trial takes place under 3 & 4 W. 4, c. 42. s. 17., does not, after promising to do so, send his notes of the trial within the time proper for moving for a new trial, the court will enlarge vol. 17.

the time for moving, and permit the facts proved at the trial to be laid before it on affidavits. Thomas v. Edwards, T. 1884.

Motions for new trials after write of trial, under 3 & 4 W. 4. c. 42, s. 17. should be made on an affidavit verifying the notes of the presiding judge annexed thereto, to be his notes, without further affidavits. Grangs v. Shoppee, E. 1884. 1000 The affidavit verifying the sheriff's notes of a trial had under a writ of trial, pursuant to 3 & 4 W. 4. c. 42. s. 17. need only state that the paper annexed contains the notes sent by the sheriff to the court. Hellings v. Stevens, E.

TROVER.

1834.

A quantity of hops was purchased from the defendants in April 1881, the invoice of which contained the words "on rent." The hops remained in the seller's warehouse. and a bill accepted by the buyer was afterwards given them at their request, which they indorsed on getting it discounted. During the running of that bill, part of the hops was delivered, in pursuance of the buyer's order to his subpurchaser, who paid the warehouse rent charged by the sellers. Afterwards, and before the bill became due, the original buyer became bankrupt, and it was dishonored at maturity. Held, that though the sellers might not have a right, while the bill remained outstanding, to part with the hops remaining in their possession, the assignee of the original buyer could not maintain trover for them !without actual payment of the ! price agreed on, as well as of the warehouse rent, he having only the right of property, without that

, of possession. Miles, assignee of Faux, a bankrupt, v. Gorton: and . others, H. 1834. An order signed by O. for the delivery by the defendants, wharfingers, of twenty sacks of flour to the plaintiff, (the party named in the order,) was lodged with and accepted by them in the usual course of business; they at the same time declaring they had but five sacks to spare, which the party might have, and he received accordingly. On application for the rest, they declined to deliver it. On trover brought against them by the party named in the order, it did not appear that he knew that O. had any other flour in the defendants' possession, and " the defendants did not produce "any delivery orders, by which any such flour had been previously ap-propriated by O. The jury found that the defendants had accepted the order generally, and gave a verdict for the plaintiff for the value of the fifteen sacks. The court refused to disturb the verdict, and held that trover was maintainable, as the defendants had not limited their acceptance of the order to any minor quantity of O.'s flour then in their hands, or alleged that they must select the sacks to be delivered to the plaintiff. Gillett v. Hill and another, H. 1894. Trover lies for a lost bank note, which

the defendant has tortiously converted to his own use, though part of the proceeds has been paid by him to the plaintiff. The acceptance of part does not affirm the taking, so as to walve the fort, Linderhay, T. 1834. but the amount received will go in reduction of damages. Burn v. Morris, E. 1834. 485

184 USE AND OCCUPATION ...

A landlord being in possession of

the premises lately held by solvent tenant, in which were tures belonging to the latter, as to give up possession on hi signees paying 71. for the rent due. They entered and the fixtures, but no occupation them was proved. Held, tha 7L could not be recovered or count on an account stated. 'defendant's agreement to: pay sum not being bottomed on previous transactions between parties. Clarke and Wife v. I and another, T. 1884.

A lessee covenanted to pay an a tional rent for every acre, and in proportion for a less qual of the land which he should " fer to be occupied" by any a person without the consent of landlord. The lessee permi his labourers to raise a cro potatoes on small portions of land demised between harvest seed time, according to the cus of the country. Held, that was liable to pay the additi rent, though the lease contain coverant that the tenant shuse "and occupy," dress and nure the land, according to custom of the country. Gr slade v. Tapscott, T. 1834.

An action was brought against persons, being the executors deceased termor, for the use occupation by them of the dem premises il sulentry and occupa hy one was proved. Held, the did not enure as that of both, a to make them jointly liable de ! ... proprus in assumpsit for use. ... ogcipation ... Nation v. Tozer

USER OF WAY. See Bright v. Walker,

VACATION. See Bail.—Judges' Order.

VARIANCE.

See BAIL BOND.

and declaration. Between writ Knowles v. Stevens. Writ in trespass indorsed in debt and declaration in assumpsit. Writ and declaration were both set aside for variance; though the objection to the writ itself had not been previously taken. Edwards 213 v. Dignam, H. 1854. The writ of summons was against

Andrews Bryan " in an action on promises," and the defendant's name was similarly spelt in the distringas; but in the copy of the writ served on defendant the name of Andrews was stated to be Andrew:-Held that the distringas must stand, for the service of the copy was not made in pursuance of 2 W. 4. c. 39., but according to the practice of the court. **9**94 bus v. Bryant, E. 1834.

(Between Distringus and Writ of Summons.)

A distringus in a plea of trespuss on the case on promises will not be set aside, though the writ of summons was " in an action on promises." S. C.

VENDITIONI EXPONAS.

See SHERIFF.

VENDOR AND PURCHASER.

By the conditions of sale of leasehold premises, the vendors stipulated that they should deliver an abstract of the lease and of the subsequent title under which the leasehold lots were held, but should not be obliged to produce the lessor's title. The defendant became the purchaser, and on investigating the title for himself, it appeared to be defective, and he

refused to complete the purchase: Held, that the purchaser was not concluded from inquiring aliunde into the lessor's title, by the stipu-"lation that the vendors should not be obliged to produce it. Shepherd and others, assignees of Plumner, v. Keatley, T. 1834. 571

VENUE.

An affidavit of a good defence on the merits is not necessary in order to changing the venue on special grounds, where the facts sworn to amount to a good defence, e, g. where it is sworn that the debt has been satisfied. Johnson v. Beresford, M. 1833. The venue having been changed from London to Hereford in an action of covenant on a lease for non-payment of rent for premises situate in Hereford, the court refused to bring it back. Arden v. Mornington, M. 1833. 56 In an action for breaches of covenants in a lease to manure, repair, &c., the venue will not be changed on the ground that it will be necessary to call witnesses for the defence who live in the county to which it is sought to remove the cause, and that a fair trial can only be had in that county until after issue joined, when the nature of the defence would appear. Rohrs v. Sessions, H. 1834. 275 The inserting venue in the body of a declaration, contrary to Reg. Gen. Hil. 4 W. 4, No. 8. is the subject not of demurrer, but of an application to a judge at chambers to strike it out. Tanner v. Champneys, Bart. T. 1834. .859

VESTED INTEREST, 384

WAIVING TORT.

Burn v. Morris.

485

WARRANT OF ATTORNEY.

See Practice, (Cognovit.)

The plaintiff's attorney may make the affidavit that the debt is unpaid, in support of a motion to enter up judgment on an old warrant of attorney, if he has been · employed in managing the principal, and in receiving and paying over the interest. Ashman v. Bowdler, M. 1829. . 84

WARRANTY.

The warranty of a servant respecting : whose authority from his master no more appears than that he was entrusted not to sell but to deliver a horse and receive another with some money in exchange, pur-".suant\to some previous bargain, the terms of which are not shown, will not bind his principal. Woodin v. Burford, H. 1834.

WAY.

See TITHES.

The plaintiff, assignee of a lease granted for lives by a bishop in right of his see, used a way, without interruption, to and from his premises for more than twenty years over the locus in quo called the Acre. The defendant, who was possessed of the Acre by assignment of a similar lease of it, obstructed the way. In an action on the case for this obstruction, Held, first, that since 2 & 3 W. 4. e. 71. the above user conferred no title as against the reversioner the bishop; nor, secondly, against his lessee, or persons claiming under auch lessee during the term.

A declaration claiming a right of way "by reason of" the possession of certain premises, is supported by proof of a reservation of the way in a conveyance of them granted by a tenant for life to the plaintiff. Bright v. Walker, 1834.

WAY-GOING CROP.

See Landlord and Tenant.

WITHDRAWING JUROR. See Costs.

WITNESS.

A party in a cause executed a tlee poll of release to an intended w ness, who was otherwise inco petent, and handed it to his: torney to be used if it should necessary to call the witness at 1 trial; it being afterwards thou: advisable to release another w ness, his name was inserted in t release, and the party re-execut before it had been delivered out his attorney's possession :---He that it was still in fieri, and mig be read in evidence without fresh stamp.

But quære, whether one star is sufficient on a release to ti witnesses. Spicer v. Burgess. 1834.

A witness called to produce a doc ment pursuant to a subpœna due tecum, was sworn as a witness mistake, and a question was ask him, but he did not answer Upon this the learned judge 1 fused to suffer him to be cro examined by the opposite par who afterwards called him as own witness:-Held, that t course having laid the whole e dence before the jury, the co would not disturb the verdict.

Quæra, if the evidence had I been thus given in chief, whetl the witness having been sworn a asked a question, without giv an answer, was liable to ero examination by the opposite par See the general rule, that he need not have been sworn as a witness, Summers v. Moseley, ante, 158. Rush v. Smyth, T. 1834.

WOODS.

A manor with the lands and woods over which common was claimed. had been from time immemorial parcel of Cranbourne Chase. 17 Eliz. the lord being owner of certain coppices and woods in the manor, granted several leases, for a thousand years, of messuages and lands, with common of pasture as appurtenant thereto, for beasts, over such coppices and woods, in the manner then accustomed by others having like common. right of common then accustomed was from 12th May to 22d Nov., except in those parts of the woods wherein the owner from time to time cut down the wood or underwood at his pleasure, and which he was accustomed to inclose with a fence to preserve the young growth, excluding the deer of the chase for three years, and all commonable cattle for four years, after each cutting. This right was enjoyed by the grantees till the disturbance complained of. T'he question was, whether the owner of the woods could legally inclose any part of them where the wood had been cut down, so as to keep out all commonable cattle for seven years after each cutting? Held that he could not, on two grounds: first, that stat. 22 Ed. 4. c. 7. does not apply to woods wherein rights of common exist; and secondly, that 35 Hen. 8. c. 17. s. 8. only extends to woods in which there exists immemorial right of common, in which case it provides a course by which the space where wood is intended to be cut may be inclosed and kept in severalty for seven years. Dibben v. Marquess of Anglesea; Marquess of Anglesea y. Dibben; Same v. Peyton, Dibben and Lill, E. 1834.

Where by an order of reference the costs of the causes referred were to abide the event of them, and in one, which was not at issue, the arbitrator found that the plaintiff had no cause of action against the defendants:—Held, that the costs of the pleadings followed the event of the cause, as in case of a nonsuit. S. C.

WORK AND LABOUR.

See Pleading, Chappel v. Hicks, 43

WRIT.

Effect of resealing. See Limitations. Concurrent. See Lowis v. Morris.

907

Where it is sought to set aside a declaration and all subsequent proceedings on an affidavit of defendant that he was not personally served with process, and of his brother who lived in the house. that the writ was served on him by mistake on two occasions, the proceedings will stand unless it is sworn for the defendant that the copy served did not reach his hands, or come to his possession, or was not shown him by his Phillips v. Ensell, T. brother. 1834.

An alias or pluries need not, since 2 W. 4. c. 39., be tested of the return day of the first writ, and their issuing is not confined by sec. 10. to any given period after the expiration of the first writ, except it issued to prevent the operation of the statute of limi.







